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No. 03-_____

In The
Supreme Court of the United States

STEVEN E. PERLMAN,

Petitioner,

v.

UNITED STATES DEPARTMENT OF JUSTICE,

Respondent.

On Petition For A Writ Of Certiorari To The
United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case presents the following important questions concerning an individual's ability to obtain information that would open agency action to the light of public scrutiny.

1. Whether the Second Circuit Court of Appeals erred in concluding that a record created by the Department of Justice's Office of Inspector General was compiled for law enforcement purposes pursuant to 5 U.S.C. § 552(b)(7);

2. Whether the Second Circuit Court of Appeals failed to apply a balancing test to determine if the privacy interests of high-ranking government officials who served as witnesses in a government investigation are outweighed by the public interest.

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PETITION FOR A WRIT OF CERTIORARI

Steven E. Perlman respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals of the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. *infra* 1a -14a) is reported at 312 F.3d 100 (2d Cir. 2002). The opinion of the district court (App. *infra* 15a-30a) is unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on November 25, 2002. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant provisions of the Freedom of Information Act, 5 U.S.C. § 552(a) et. seq. are reproduced at App., *infra*, 31a.

STATEMENT

Petitioner Steven E. Perlman ("Perlman") is an experienced immigration attorney and former Foreign Service Officer of the United States Department of State ("DOS"). Through the Freedom of Information Act ("FOIA") he sought the release of a 143-page Report of Investigation ("ROI") created by the Office of the Inspector General ("OIG") of the U.S. Department of Justice ("DOJ"). The ROI examined allegations of impropriety on the part of high-level officials of the U.S. Immigration and Naturalization Service ("INS") in implementing the Alien Entrepreneur ("EB-5") visa program. In investigating the EB-5 program, the OIG was particularly interested in the activities of Paul Virtue, a former INS General Counsel and Executive Associate Commissioner for Programs, a top INS policy-making position.

A. The Corruption Of The EB-5 Visa Program By INS Officials In Order To Extend Favoritism To Former INS And Government Officials

The EB-5 program was created by Congress in 1990. It permits an alien to seek U.S. permanent residence by creating a new business that employs at least ten American workers through a capital investment of at least one million dollars. The INS is permitted to reduce the capital requirement to a half-million dollars for enterprises in "targeted" areas of high unemployment or rural areas. An EB-5 alien may invest in a sole proprietorship or may form partnerships with other investors.

If approved for the program, the alien is issued an immigration visa and is admitted to the United States for a two-year period of conditional permanent residence. Towards the end of this period, the alien must file another petition with INS to verify that the EB-5 program requirements have been substantially met. If INS is convinced, it removes the condition on the alien's permanent resident status; if not, the alien becomes deportable. *See* Second Circuit Joint Appendix ("JA") at 111,183.

Over a period of several years examined in the ROI (1994 – 1998), officials within the INS knowingly facilitated the hijacking of the EB-5 program by a group of private companies that were owned or represented by many former top officials of INS and DOS and other politically prominent individuals. These companies purportedly pooled the capital of EB-5 aliens together into limited partnerships for investments in various enterprises, but, in fact, only invested token amounts of a few thousand dollars per alien. The remainder of the money was held in reserve, was never actually invested and simply remained in the hands of the private companies. *Id.* at 112.

The EB-5 companies concocted various schemes that typically required an alien to make a one-time payment of

only about one hundred twenty-five thousand dollars. The aliens signed purported promissory notes for the three hundred seventy-five thousand dollar balance. Once the two-year condition on permanent residence had been removed, the aliens forfeited their investment interests to the partnerships run by these EB-5 companies. The promissory notes were forgiven and the aliens never paid off the notes. Thus, private companies literally sold the precious right of U.S. permanent residence (and the ultimate possibility of U.S. citizenship) for a one hundred twenty-five thousand dollar commission, from which hardly any capital was invested and few, if any, jobs were created, while the vast remainder of the funds raised remained in their own hands. *Id.* at 112-113.

Perlman first became aware of these "investment plans" through his clients in 1995. After investigating the situation, Perlman was concerned enough to meet with various INS officials in Washington, D.C. to discuss perceived improprieties in the administration of the EB-5 program. Based in part on Perlman's information, several INS officials began to review the administration of the program. Indeed, they expressed concern that preferential treatment was being accorded former INS officials. DOS officials also raised concerns about the EB-5 program. *Id.* at 112-114.

During 1996-97, the INS adopted plainly indefensible legal positions in order to render the sham investments seemingly legal. Many irregular procedures and practices were also put into effect in order to expedite the approval of the sham investments and prevent reviewing officials from exercising their normal prerogatives to challenge questionable cases. A rebellion developed within the INS General Counsel's office, which led to the issuance of a

December 1997 legal opinion that held unlawful many of the provisions in the sham investment plans.[1]

As a result, many of the aliens who had obtained EB-5 conditional residence were unable to remove their two-year condition as their "investments" had now been determined to be "non-qualifying". Several groups of the aliens filed suit against INS to finalize their permanent residence. *Id.* at 114-117. Depositions taken during these lawsuits reveal that highly unusual and irregular actions surrounded the administration of the EB-5 program for years. See *www.usa-immigration.com/litigation.htm.*

By Memorandum dated January 23, 1998, the Acting INS General Counsel referred the controversy surrounding the EB-5 program to the DOJ OIG for investigation. JA at 117,123-126. The Memo asserted that there existed an "appearance of impropriety involving high ranking INS employees of the Administrative Appeals Unit, Adjudications Division, Office of Programs, and of this Office [of General Counsel]." *Id.* at 123.

After interviewing numerous officials within INS and DOS - several of whose statements were excluded, for reasons unknown, from the final ROI - the OIG obtained evidence that in implementing the EB-5 program undue access had been provided to former INS and DOS officials. The investigation, which dragged on for an inordinate amount of time, ultimately centered around Virtue because he served as the primary controlling authority on all

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[1] While this FOIA litigation was being pursued, four INS attorneys willingly submitted privacy waivers in order to allow greater disclosure of the ROI. It is obviously rare that current government officials, particularly attorneys, would contribute to an independent FOIA requester's quest to obtain the release of a record that clearly embarrasses their own agency. This fact revealed the level to which dissension existed as a result of how several high-level INS officials illegally hijacked the EB-5 program.

decisions. Given that Virtue left government service before the investigation was completed (investigators had completed all interviews except Virtue's as of March 1999, but delayed interviewing Virtue until August 1999 - after he had resigned in May 1999), the OIG completed the ROI in October 1999 without taking further action. *Id.* at 57.

B. Petitioner's FOIA Lawsuit And The District Court's Upholding Of The Government's Redactions

Perlman submitted his FOIA request for the ROI on November 17, 1999. *Id.* at 7,51,118. By letter dated January 27, 2000, the OIG refused to release even one page claiming that the entire document was exempt from disclosure on grounds of personal privacy pursuant to Exemptions 6 and 7(C). *Id.* at 7,16,52,118. Perlman appealed the DOJ's decision by letter dated February 7, 2000. *Id.* at 8,17-18,118-119. His lawsuit followed on August 7, 2000, following DOJ's failure to take timely action on Perlman's appeal. After the initiation of litigation, by letter dated October 30, 2000, the DOJ partially released 49 pages of the 143-page ROI. *Id.* at 45,53-54,119.

During the briefing of the DOJ's Motion for Summary Judgment, and following the submission of a privacy waiver by Sheldon Alexander Gisser, an attorney formerly with the INS General Counsel's Office, the DOJ released portions of an additional four pages on February 6, 2001. *Id.* at 143-147. Following oral arguments, and the district court's announcement that the ROI must be submitted for *in camera* review, the DOJ released portions of another 30 pages on June 29, 2001. *Id.* at 148-180.

The district court granted in part and denied in part the DOJ's Motion for Summary Judgment on August 3, 2001. App., *infra*, at 15a-30a. Based on its review of the ROI, the district court ordered the disclosure of portions of an additional 19 pages. Perlman timely filed his Notice of Appeal on September 24, 2001. JA at 205. The DOJ finally

released the pages identified by the district court by letter dated October 30, 2001.[2]

C. The Decision Of The Second Circuit To Withhold Crucial Information Necessary To Reveal The Extent Of Corruption Within INS

Before the Second Circuit Court of Appeals, Perlman advocated four primary arguments: (1) that the ROI was not a "similar file" under Exemption 6; (2) that the ROI was not compiled for law enforcement purposes under Exemption 7; (3) that the privacy interests of high-level witnesses interviewed as part of the OIG investigation did not outweigh the public interest in disclosure of their testimony; and (4) that the privacy interests of Virtue did not outweigh the public interest in disclosure of the information relating to him that was developed by the OIG. Oral arguments were held on May 14, 2002, and the court issued its decision on November 25, 2002.

The Second Circuit, after reviewing the ROI *in camera*, upheld the application of Exemptions 6 and 7, and held that the privacy interests of the witnesses in shielding their names and "identifying characteristics" outweighed that of the public interest (although the remainder of their testimony could be released). App., *infra*, at 1a-14a. However, after applying a balancing test that incorporated five suggested factors, the court found that the public interest outweighed Virtue's privacy interests and ordered the district court to release additional information consistent with their opinion. *Id.* As of the date of this Petition, no new information has been released.

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[2] However, the DOJ failed to release an updated version of the List of Exhibits that reflected information that had been disclosed since October 2000. Additional portions of this list were ordered released by the Second Circuit Court of Appeals.

REASONS FOR GRANTING THE PETITION

This Court should review the decision of the Second Circuit because there is a split among the Circuits concerning whether records compiled by an agency's Inspector General's Office are automatically considered law enforcement records under the FOIA. More importantly, the courts are without proper guidance on the balancing test that should be applied in considering whether witness names and identifying information can be released when the public's interest outweighs an individual's privacy interests.

"[D]isclosure, not secrecy, is the dominant objective" of the FOIA. *Department of Air Force v. Rose*, 425 U.S. 352, 361 (1976). FOIA's primary purpose is to shed light on the operation of government. *Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 773 (1989). "This purpose is effectuated by 'facilitat[ing] public access to government documents,'" *Department of State v. Ray*, 502 U.S. 164, 173 (1991), and by "pierc[ing] the veil of administrative secrecy and [] open[ing] agency action to the light of public scrutiny." *Rose*, 425 U.S. at 361. These beliefs are not mere platitudes but, rather, important principles of open, democratic government.

In keeping with the policy of full disclosure, exemptions are to be "narrowly construed with doubts resolved in favor of disclosure." *FLRA v. United States Dep't of Veterans Affairs*, 958 F.2d 503, 508 (2d Cir. 1992). And, where an agency withholds or redacts documents requested under FOIA, the agency bears the burden of sustaining its action." *Massey v. FBI*, 3 F.3d 620, 622 (2d Cir. 1993).

I. THE SECOND CIRCUIT COURT OF APPEALS ERRED IN CONCLUDING THAT THE DOCUMENT IN QUESTION HAD BEEN COMPILED FOR LAW ENFORCEMENT PURPOSES AND ENTITLED TO PROTECTION UNDER FOIA EXEMPTION 7(C)

In order to withhold portions of the ROI, the DOJ asserted FOIA Exemptions 6 and 7(C). The DOJ asserted that the material withheld falls into three categories: (i) the names of OIG special agents involved in the investigation; (ii) the names of witnesses and others mentioned in the report and information relating to them; (iii) information related to Virtue. *Perlman v. United States Dep't of Justice*, 312 F.3d 100, 104 (2d Cir. 2002).[3] Exemption 6 permits the withholding of "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). Exemption 7(C) protects records that were compiled for law enforcement purposes but only to the extent that disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy." *Id.* at § 552(b)(7)(C).

Perlman does not challenge the Second Circuit's determination that the ROI was a "similar file" under Exemption 6. However, the court erred in concluding the ROI was compiled for law enforcement purposes automatically entitling Exemption 7 protection.

Before Exemption 7(C) can apply, an agency must first establish that the requested records were "compiled for law enforcement purposes." *Ferguson v. FBI*, 957 F.2d 1059, 1065 (2d Cir. 1992). "[A]n agency's general internal monitoring of its own employees to insure compliance with the agency's statutory mandate and regulations is not protected from public scrutiny under Exemption 7." *Stern v.*

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[3] Perlman waived his interest in disclosure of the identities of any OIG Special Agents (category (i)) or the personal information concerning Virtue contained on page 3 of the ROI ("Subject of Investigation"), except with respect to the information withheld in the category "Criminal Record". He also declined to seek disclosure of the names of any alien investors or other identifying information associated with the alien investors (category (ii)).

FBI, 737 F.2d 84, 89 (D.C.Cir. 1984)(citations omitted).

> Therefore, in reviewing Exemption 7(C), courts must: distinguish between internal investigations conducted for law enforcement purposes and general agency internal monitoring that might reveal evidence that later could give rise to a law enforcement investigation: an agency's investigation of its own employees is for "law enforcement purposes" only if it focuses "directly on specifically alleged illegal acts, illegal acts of particular identified officials, acts which could, if proved, result in civil or criminal sanctions.

Kimberlin v. Dep't. of Justice, 139 F.3d 944, 947 (D.C.Cir. 1998)(citation omitted).

The Second Circuit accepted the DOJ's argument that the ROI was "compiled for law enforcement purposes" within the meaning of Exemption 7(C) because the ROI "was compiled in connection with an investigation by [the Office of Inspector General] into possible violations of law and, in particular, whether a certain employee, namely Virtue, committed acts that could subject that employee to criminal or civil penalties." *Perlman*, 312 F.3d at 105, citing *Perlman v. Dep't of Justice*, 2001 WL 910406, at *4. In reaching this finding, the Second Circuit relied in significant measure on *Ortiz v. United States Dep't of Health and Human Services*, 70 F.3d 729, 734 (2d Cir. 1995), *cert. denied*, 517 U.S. 1136 (1996), a holding in the Second Circuit that all OIG investigations are automatically deemed to have been created for the purpose of law enforcement.

However, Inspector General Offices perform activities that are routine, administrative and non-criminal in nature; exactly the type of functions that constitute general internal monitoring. Indeed, the official description of the DOJ OIG is that it "promotes economy, efficiency and effectiveness

within the Department. The Inspector General also enforces criminal and civil laws, regulations and ethical standards within DOJ by investigating individuals and organizations who allegedly are involved in financial, contractual or criminal misconduct in DOJ programs and operations."[4] *See www.usdoj.gov/oig/igintro.htm.*

The INS referral memorandum to the DOJ OIG merely contains generalized allegations regarding the implementation of the EB-5 program and references appearances of impropriety. JA at 123-126. This is strikingly similar to DOJ OIG's own official description that it enforces ethical standards within the DOJ; i.e., potential violations that may or may not rise to the level of criminal conduct (or even civil liability). Moreover, that the OIG may have ultimately specifically focused on Virtue at some point while it conducted an internal monitoring of the implementation of the EB-5 program does not justify a finding of a "law enforcement" record.

In fact, the ROI Synopsis itself cites allegations of odious or unethical conduct, but not criminal acts, as the reason for the investigation.

> This investigation was initiated pursuant to allegations that INS General Counsel Paul Virtue, while the senior INS official responsible

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[4] This specific investigation was conducted by the OIG's Washington Field Office through its Investigations Division. The Investigations Division "investigates alleged violations of fraud, abuse and integrity laws that govern DOJ employees, operations, grantees and contractors. Investigations Division Special Agents develop cases for criminal prosecution and civil or administrative action." *See www.usdoj.gov/oig/igintro.htm.* This description alone reveals that the ROI is not necessarily a "law enforcement record". The Investigations Division investigates DOJ "operations", such as the EB-5 program. While its Special Agents do develop evidence for "criminal prosecution" and "civil" cases, so too do they handle information for "administrative action."

> for the daily administration of the EB-5 Investor Visa program, *improperly granted* former INS officials (who either represented or were principals in various EB-5 investment partnerships) *preferential treatment, and undue access and influence* in the administration of the EB-5 program and the adjudication of their clients' visa petitions.

Id. at 56 (emphasis added).

It is relevant to note that the ROI itself indicates that prosecutorial involvement in the OIG investigation was ruled out on the very first day that the investigation commenced. It is also relevant to note that the released portions of the ROI reveal that the Virtue Memorandum of Interviews, the Synopsis and the List of Exhibits were all compiled after Virtue had resigned from INS (in May 1999), which effectively placed him beyond the reach of disciplinary action. Thus, despite the official description of the OIG investigation as one relating to employee misconduct, it is apparent that in reality, the OIG had no law enforcement purpose for this investigation, whatsoever.

Given the breadth of jurisdiction possessed by the OIG, there are many different reasons, not all of them law enforcement, why an investigation would be conducted and a report compiled. A blanket holding that an OIG investigation is for purposes of law enforcement in all cases is inconsistent with the DOJ OIG's own mission statement and with the specific facts relating to the ROI in this case. Therefore, the Second Circuit's holding in *Ortiz* and its specific finding that the ROI was compiled for purposes of law enforcement should be overturned.

Upon finding that the ROI was not compiled for purposes of law enforcement, FOIA Exemption 7(c) would be

inapplicable as a bar to release of the witness Memorandum of Interviews or other third party information.[5]

II. EVEN IF FOIA EXEMPTION 7(c) WERE APPLICABLE, THE QUESTION OF WHETHER THE PUBLIC INTEREST OUTWEIGHS ANY PRIVACY INTERESTS OF HIGH LEVEL GOVERNMENT WITNESSES AND THIRD PARTIES MUST BE DETERMINED UPON APPLICATION OF A BALANCING TEST

With respect to witnesses and third parties referenced in the ROI, the Second Circuit opined:

> These parties possess strong privacy interests, because being identified as part of a law enforcement investigation could subject them to "embarrassment and harassment," especially if "the material in question demonstrates or suggests they had at one time been subject to criminal investigation."...The public's interest in learning the identity of witnesses and other third parties is minimal because that information tells little or nothing about either the administration of the INS program or the Inspector General's conduct of its investigation....The strong public interest in

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[5] Indeed, the DOJ failed to provide any evidence to the district court that distinguishes this matter from similar circumstances such as in *Greenpeace USA, Inc. v. EPA*, 735 F.Supp. 13 (D.D.C. 1990) where the records in question addressed "whether an agency employee has complied with agency regulations", *id.* at 15, or in *Cotton v. Adams*, 798 F.Supp. 22 (D.D.C. 1992), where the investigation in question "merely involve[d] an alleged violation of the [agency's] own rules." *Id.* at 25. In fact, Virtue admitted to the OIG that he violated INS policies. Therefore, at the very least, in order to support its Exemption 7(C) claim, the DOJ should explain "why it decided not to follow through with the investigations." *Davin v. U.S. Dep't of Justice*, 60 F.3d 1043, 1057 (3d Cir. 1995).

> encouraging witnesses to participate in future government investigations offsets the weak public interest in learning witness and third party identities. We find that the district court correctly concluded that the names of witnesses and third parties, along with their identifying characteristics, were properly excluded.

Perlman, 312 F.3d at 106 (citations omitted). This broad brush pronouncement inappropriately failed to take into consideration the necessary – or any – balancing test to actually determine which interest, that of the public or the individual, prevails.

In its determination that Virtue's privacy did not outweigh the public interest, the Second Circuit appropriately considered several factors including:

> (1) the government employee's rank; (2) the degree of wrongdoing and strength of evidence against the employee; (3) whether there are other ways to obtain the information; (4) whether the information sheds light on a government activity; and (5) whether the information is related to job function or is of a personal nature.

Id. at 107. The factors are not all inclusive, and no one factor is to be viewed as dispositive. *Id.* In identifying these factors, the Second Circuit noted they were to be applied in "balancing a government employee's privacy interests against the public's interest in disclosure". *Id.* It made no distinction between witnesses and an individual under investigation. Nor should it have. However, the Second Circuit only applied these factors to determine whether

Virtue's privacy was outweighed and not that of the witnesses.[6]

This Court has made it clear that in evaluating whether a request for information lies within the scope of a FOIA exemption that bars disclosure when it could amount to an "unwarranted" invasion of privacy" a court must balance the public interest in disclosure against the interest Congress intended the exemption to protect." *Reporters Committee*, 489 U.S. at 776; *Rose*, 425 U.S. at 372.

The witnesses whose names and interviews are contained within the ROI but have been withheld are or were mid and high-ranking government officials. Nearly all were attorneys. These include former INS Commissioners, General Counsels, Department Heads, Chiefs of Staff, Deputy General Counsels, Associate Counsels, Senior Adjudications Officers, Special Assistants Branch Chiefs and DOS Consular Officers. JA at 117-118.[7] The fact that senior government officials would provide derogatory information or criticism concerning the conduct of other high-level

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[6] Regardless of whether Exemption 6 and/or 7(C) apply, a balancing of the public interest in disclosure against the possible invasion of privacy caused by the disclosure must still be considered in order for either Exemption to ultimately be upheld. *See Reporters Committee*, 489 U.S. at 762 (Exemption 7(C)); *Rose*, 425 U.S. at 373 (Exemption 6). While both Exemptions 6 and 7(C) implicate privacy interests, the "standard for evaluating a threatened invasion of privacy interests resulting from the disclosure of records compiled for law enforcement purposes is somewhat broader than the standard applicable to personnel, medical, and other similar files." *Reporters Committee*, 489 U.S. at 756.

[7] Furthermore, many of the individuals whose statements are being withheld in full have their names and positions disclosed throughout the ROI and its exhibits. Many of the key witnesses, such as Paul Virtue, Michael Becraft, David Dixon, S. Alexander Gisser, Katherine A. Lorr and Janice Podolny, have also been deposed in various court actions relating to the EB-5 program. *See www.usa-immigration.com/litigation.htm.*

government officials and the manner in which federal programs were being implemented is in and of itself a matter of significant public interest.[8] Disclosure of these witnesses' identities, or at least the contents of their statements, would without question "open agency action to the light of public scrutiny." *Rose*, 425 U.S. at 372. *See also Miller v. Bell*, 661 F.2d 623 (7th Cir. 1981), *cert. denied sub nom. Miller v. Webster*, 456 U.S. 960 (1982)(names of witnesses interviewed in investigation of alleged telephone wiretap must be disclosed where disclosure reveals nothing of a private nature and interviewees had no expectation of privacy); *Poss v. NLRB*, 565 F.2d 654 (10th Cir. 1977)(Exemption 7(C) inapplicable to witness statements since matters involved no personal privacy concerns and statements were made by individuals who could be called to testify publicly at trial); *Associated Dry Goods Corp. v. NLRB*, 455 F.Supp. 802 (S.D.N.Y. 1978)(same).

Specifically, the witnesses' statements contain detailed information regarding how a controversial INS program was being implemented and how high-ranking government officials, to include the General Counsel himself, permitted deviation from the lawful requirements imposed by Congress, possibly in violation of the law. Release of additional information from the ROI would shed light on the behavior of the INS General Counsel and other high-ranking public officials in connection with the operations and activities of a federal program. Given that Virtue admitted to violating INS regulations and policies, release of additional

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[8] The information within the ROI and its exhibits is nothing like that which was protected by this Court in *Ray* where the interview summaries revealed "highly personal information regarding marital and employment status, children, living conditions, and attempts to enter the United States" of private non-U.S. citizens. *Id.* 112 S.Ct. at 548. Here the withheld information originated from senior government officials who described the official (mis)conduct of other government officials.

information would also call into question the integrity and conduct of the DOJ. This is a clear cut case for which FOIA was intended and directly falls within the ambit of information to be released as directed by precedent of this Court. *Reporters Committee*, 489 U.S. at 774-775.

The Second Circuit's blanket determination that certain identifying witness information should be withheld is without sufficient basis. There is absolutely no evidence in the record that the witnesses, all of whom were high-ranking government officials, would refuse to be witnesses in any future official investigations, or that release of their identities would impact the future cooperation of witnesses who are private citizens.[9] Individuals in these official positions should not be accorded the same level of privacy protection as private witnesses. Indeed, as federal employees, the witnesses referenced in the ROI had no choice but to cooperate with an investigation when official acts are at issue. *See* 5 U.S.C. Appx. § 6(a)(3)-(5). The OIG did not have to elicit their voluntary cooperation. Moreover, due to the high-level posture of their positions, they were obligated to take responsibility for reporting on governmental operations despite any arguable threat of embarrassment, harassment or retaliation. Such threats would be of greater concern in the case of lower level public officials or private citizens. Of course, Virtue - the key official who might be predisposed to retaliate against those who provided information concerning his (mis)conduct - is no longer in government service (nor are several of the other high-level officials). Moreover, it is unlawful for anyone to reprise against any OIG witness or informant who gives truthful testimony. *Id.* at § 7(c).

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[9] Nor did DOJ ever argue it had promised confidentiality to any witness, either explicitly or implicitly. *Cf. Ray*, 112 S.Ct. at 549 (assurance of confidentiality factor in determining disclosure of interviews).

"Withholding information to prevent speculative harm is indeed contrary to the statute's policy favoring disclosure." *Carter v. U.S. Dep't of Commerce*, 830 F.2d 388, 391 (D.C.Cir. 1987). There should have been an attempt to first link each withheld portion of the ROI with a discussion of "the consequences of disclosing the sought-after information." *Lawyers Committee for Human Rights v. INS et al.*, 721 F.Supp 552, 560 (S.D.N.Y. 1989).[10] When faced with threats to privacy interests that amount to nothing more than mere possibilities, this Court has suggested that lower courts "discount the probability of invasion of privacy in light of attendant circumstances." *Rose*, 425 U.S. at 380 n.19.[11]

The public has "a strong public interest in uncovering corruption in a government agency." *Dobronski v. FCC*, 17 F.3d 275, 278 (9th Cir. 1994). "One of the purposes of the FOIA was to let some daylight into the bureaucratic swamp." *Id.* The administration of the EB-5 was such a swamp, which is why the release of the identities and identifying characteristics of witnesses and/or third parties, particularly if these individuals were serving as high-level government

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[10] This Court has repeatedly emphasized, what is explicit in the terms of the FOIA, that "the burden is on the agency to sustain its action." 5 U.S.C. § 552(a)(4)(B); *Department of Justice v. Tax Analysts*, 492 U.S 136, 142, n. 3 (1989); *Reporters Committee*, 489 U.S. at 755.

[11] This Court noted, for example, that "[t]he legislative history is clear that Exemption 6 was directed at threats to privacy more palpable than mere possibilities." *Rose*, 425 U.S. at 380 n.19. "Exemption 6 does not protect information regarding professional relationships or materials associated with an agency's business." *Lawyers Committee*, 721 F.Supp. at 563 (citation omitted). The ROI contains both. Moreover, the identities of the witnesses would surely be discoverable in a civil case brought against INS arising out of the EB-5 program. *See Castaneda v. United States*, 757 F.2d 1010, 1012 (9th Cir. 1985)(because investigator's name could be discovered using other methods it is hard to see how the disclosure would seriously infringe on his privacy).

officials, would unquestionably allow the public to evaluate the INS's discharge of its duties in awarding EB-5 visas. *See Rojem v. United States Dep't of Justice*, 775 F.Supp. 6, 11 (D.D.C. 1991)(disclosure of identities justified if factual basis exists permitting court to even question an agency's performance of its duties).

The Second Circuit specifically noted that the "ROI investigates the extent to which former INS officials were able to obtain preferential treatment, undue access and exercise improper influence over the administration of the EB-5 program through their contact with Virtue." *Perlman*, 312 F.3d at 108. Indeed, the released portions of the ROI Synopsis explicitly reveal that the EB-5 program was substantially taken over by a group of investment partnerships (many of which were represented or owned by former INS officials) that did little or no investing. JA at 56-57.

The Synopsis states that 2,761 EB-5 petitions were approved by INS during the time in question and that most involved a payment of $125,000 to such partnerships by each alien investor. *Id.* at 57. Therefore, simple math indicates that approximately one-third of a billion dollars was raised and converted in this manner. The EB-5 statute and regulations require that each petitioner create or preserve at least 10 full-time jobs for American workers. Since the Synopsis reveals that virtually none of the required capital was ever invested, few, if any jobs were ever created or preserved. *Id.* As a result, approximately 27,610 jobs that were supposed to have been created or preserved through this program are now missing from the American economy because of the conduct and activities of Virtue and other high-level INS officials.

Moreover, "if there is a bureaucratic cover-up going on, that is all the more reason to deny the § 6 exemption." *Dobronski*, 17 F.3d at 280. Perlman submitted uncontroverted evidence of misconduct and potential cover-

up involving the EB-5 program, including documents from the INS itself. JA at 110-126. The INS Office of General Counsel referral memorandum itself noted that there existed an "appearance of impropriety by high level ranking officials within the Administrative Appeals Unit, Adjudications Division, the Office of General Counsel, and the Office of Programs." *Id.* at 123.

No one should doubt that "[t]here is a public interest in how well public officials are performing their official duties." J. O'Reilly, FEDERAL INFORMATION DISCLOSURE 17-41 (1986). "The policy of full disclosure of all information not exempted serves the need for citizens to know what their government is up to and, generally, where the information sought sheds light on an executive agency's performance of its official duties, full access to the information serves FOIA's purposes." *Halpern v. FBI*, 181 F.3d 279, 284-85 (2d Cir. 1999). As this Court stated:

> [FOIA's] basic policy of 'full agency disclosure unless information is exempted under clearly delineated statutory language,' indeed focuses on the citizens' right to be informed about what their government is up to. Official information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose. That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct.

Reporters Committee, 489 U.S., at 773, *quoting Rose*, 425 U.S. at 360-361 (other internal quotation marks and citations omitted).

Perlman is not arguing that government officials, even those functioning at high-level positions, are devoid of privacy interests. "[A]lthough government officials ... may

have a 'somewhat diminished' privacy interest, they do not surrender all rights to personal privacy when they accept a public appointment." *Kimberlin*, 139 F.3d at 949 (citations omitted).

However, "[t]he public has a significant, enduring interest in remaining informed about actions taken by public officials in the course of their duties." *New England Apple Council v, Donovan*, 725 F.2d 139, 143 (1st Cir. 1984). *See also Carter*, 830 F.2d at 390 fn.8 (strong public interest in disclosure of information related to performance of public officials acting in official capacities).

There also exists a recognized public interest in knowing "that a government investigation itself is comprehensive," and that "a released report is accurate." *Dunkelberger v. Department of Justice*, 906 F.2d 779, 781 (D.C.Cir. 1990)(citations omitted).[12] Whether either or both attributes were actually achieved by the OIG are seriously in question. Perlman has articulated with sufficient specificity the nature of the existing public interest that overrides any existing privacy interests. JA at 110-112.

"The public interest in ensuring the integrity and the reliability of government investigation procedures is greater

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[12] Sufficient evidence exists that the ROI is incomplete. Notably absent from the ROI is any witness statement by Sheldon Alexander Gisser, an INS attorney within the General Counsel's Office. It was Gisser who essentially single-handedly led the INS and DOJ to investigate the EB-5 program. Indeed, many of the witnesses interviewed by the OIG commented on how Gisser was the most knowledgeable person regarding the EB-5 program and its problems. JA at 152. Strangely enough, although the ROI reflects Gisser was interviewed on August 10, 1998, *id.* (the released pages revealed that he supplied several of the ROI's exhibits to the OIG), his interview statement was omitted from the final ROI. The fact that a statement is missing from the one person most knowledgeable about the misconduct of high-level officials calls into question the completeness of the ROI. Finally, the apparent failure of the OIG to swear in most of the witnesses also raises questions about the seriousness and accuracy of the investigation.

where there is some evidence of wrongdoing on the part of the government official." *Hunt v. FBI*, 972 F.2d 286, 290 (9th Cir. 1992). The Second Circuit explicitly recognized that "a substantial amount of evidence shows that Virtue allowed INS officials with financial interests in the EB-5 program to exercise improper influence over the program's administration." *Perlman*, 312 F.3d at 107.

In declining to reveal the identities and identifying characteristics of witnesses and/or third parties, the Second Circuit erred by ignoring the fact that evidence of official misconduct was obtained regarding, or from, individuals holding high-level government office. That the individuals discussed or referenced in the ROI were high-level officials is a factor that should have been considered, but was not. Moreover, the barring of disclosure of the witnesses' "identifying characteristics" opens a pandora's box that could lead to the withholding of substantial information of public interest by claiming that such information would tend to identify a particular witness.

This Court consistently has taken a practical approach when it has been confronted with an issue of interpretation of FOIA. It has endeavored to apply a workable balance between the interests of the public in greater access to information and the needs of the Government to protect certain kinds of information from disclosure. The Court looks to the reasons for exemption from the disclosure requirements in determining whether the Government has properly invoked a particular exemption. *See e.g., NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 148-154 (1975). Under the specific factual and legal circumstances presented in this case, the public's interest in disclosure should have prevailed.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A -- Opinion of the United States Court of Appeals for the Second Circuit Dated and Decided November 25, 2002

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2001
(Argued: May 14, 2002 Decided: November 25, 2002)
Docket No. 01-6219

STEVEN E. PERLMAN,

Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF JUSTICE,

Defendant-Appellee,

JANET RENO, ROBERT L. ASHBAUGH,

HOWARD L. SRIBNICK and DEBORAH MARIE BRISCOE[1],

Defendants.

Before: CABRANES, POOLER, and KATZMANN, Circuit Judges.

Steven E. Perlman appeals from the August 14, 2001, judgment of the United States District Court for the Southern District of New York (John G. Koeltl, J.) granting in part and denying in part the United States Department of Justice's motion for summary judgment.

Affirmed in part, vacated and remanded in part.

MARK S. ZAID, Lobel, Novins & Lamont, Washington, D.C., for Appellant.

ANDREW D. O'TOOLE, Assistant United States Attorney for the Southern District of New York (James B. Comey, United States Attorney for the Southern District of New York, Gideon A. Schor, Assistant United States Attorney for the Southern District of New York, on the brief), for Appellee.

POOLER, Circuit Judge:

The Freedom of Information Act ("FOIA") requires courts to balance the rights of citizens to gain access to information that their federal government collects against the privacy interests of individuals and government employees discussed in the same information. Appellant Steven E. Perlman sought to exercise his FOIA rights when he requested a copy of a report investigating allegations of misconduct in the operation of an Immigration and Naturalization Service ("INS") program, focusing in large part on the actions of Paul Virtue, former INS general counsel. The United States District Court for the Southern District of New York (John G. Koeltl, J.) upheld the agency's decision to withhold the majority of the information in the report because it would violate Virtue's right to privacy. On appeal, Perlman argues that (1) the district court erred in concluding that two FOIA exemptions applied to prevent release of the information, and (2) the district court erred in finding that the privacy of Virtue, witnesses and third parties outweighed the public's interest in disclosure. We affirm the district court's determination that the information falls under certain FOIA exemptions. However, we find that the public interest in disclosure outweighs Virtue's right to privacy and order the release of additional information from the report.

BACKGROUND

Perlman filed a request under FOIA with the Department of Justice ("DOJ") on November 17, 1999, seeking the release of a 143-page Report of Investigation ("ROI") by DOJ's Office of the Inspector General. The ROI discusses allegations of impropriety on the part of INS officials in running the EB-5 Investor Visa Program ("EB-5"). Created in 1990, the EB-5 program offered special American visas to wealthy foreigners who invested between $500,000 and $1 million in business ventures employing at least 10 American workers. See 8 U.S.C. § 1153(b)(5)(A). After meeting certain conditions, the foreign investor eventually could receive permanent resident alien status. See 8 U.S.C. § 1186b. Visa investment companies sprung up in response to the creation of this program. The companies promoted the EB-5 program by offering foreign investors shares in limited partnerships, usually for $125,000, a fraction of the required investment of $500,000. Alien investors used promissory notes to meet EB-5's investment requirements. The notes permitted the investors to receive green cards without having to put up the remaining money. The INS approved this alternate route to obtaining an EB-5 visa. However, at some point allegations surfaced that former INS officials who were involved with the visa companies received improper preferential treatment from current INS employees. An investigation by DOJ's Inspector General followed, which generated the ROI.

The ROI examined the EB-5 program and the role that Virtue played in its administration while he was INS deputy general counsel and general counsel. Virtue left the INS in 1999. DOJ states that the ROI examined allegations that Virtue "improperly granted former INS officials preferential treatment and undue access and influence in the administration" of the EB-5 program. The ROI consists of (1) a synopsis, (2) a subject of investigation form, containing basic information on Virtue, (3) a list of the 40 memoranda of investigation ("MOIs"), and (4) the MOIs.

DOJ's Office of Inspector General denied Perlman's FOIA request on January 27, 2000. The Inspector General based its denial on two FOIA exemptions: Exemption 6, which concerns personnel and similar files, and Exemption 7(C), which concerns reports compiled for law enforcement purposes. Perlman administratively appealed the denial on February 7, 2000. Before receiving an answer to his administrative appeal, however, Perlman, acting pro se, brought this lawsuit in the United States District Court for the Southern District of New York on August 7, 2000. He later retained counsel. In response to Perlman's administrative appeal, DOJ's Office of Information and Privacy ordered the disclosure of 49 report pages, most redacted in some respect, but otherwise upheld the prior denial.

On December 4, 2000, DOJ moved for summary judgment in the Southern District lawsuit, submitting in support of its motion three declarations describing the information in the ROI and the reasons for withholding the redacted portions. DOJ described the redacted material as falling into three categories: (1) the names of Inspector General agents involved in the investigation; (2) the names of witnesses and others mentioned in the ROI, along with any identifying information; and (3) the information regarding Virtue. The district court, after hearing argument on June 22, 2001, ordered DOJ to review its redactions to determine whether any of the remaining material should be disclosed and to submit an unredacted copy of the ROI to the court for in camera review. Perlman v. United States Dep't of Justice, No. 00 CIV. 5842, 2001 WL 910406, at *2 (S.D.N.Y. Aug. 13, 2001). DOJ released an additional 30 pages of the ROI, again with much of the information redacted, and submitted an unredacted copy of the report to the district court.

After reviewing the entire ROI, the district court granted DOJ's motion in part and denied it in part. Perlman, 2001

WL 910406, at *6-7. The district court found the ROI was compiled for law enforcement purposes because it investigated possible violations of law by Virtue, bringing it within Exemption 7(C). Id. at *3-4. The district court also determined that the ROI was a "similar file" because it contained private information similar to that contained in personnel files, bringing it within Exemption 6. Id. at *4-5. The district court further found Virtue's privacy interests in withholding the ROI outweighed the public's interest in disclosure. Id. The district court upheld the bulk of DOJ redactions, but ordered the release of a number of exhibit documents. Id.

DISCUSSION

We review an agency's decision to withhold records under FOIA de novo, and we "may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions . . . ." 5 U.S.C. § 552(a)(4)(B); see also Halpern v. Federal Bureau of Investigation, 181 F.3d 279, 287-88 (2d Cir. 1999) (standard of review on FOIA summary judgment ruling is de novo); Grand Cent. P'ship v. Cuomo, 166 F.3d 473, 478 n.2 (2d Cir. 1999) (where district court reviews materials in camera, this court may do so on appeal). The district court reviewed the ROI in camera, and we have done so on appeal.

"The Freedom of Information Act adopts as its most basic premise a policy strongly favoring public disclosure of information in the possession of federal agencies." Halpern, 181 F.3d at 286. To that end, FOIA requires federal government agencies to make available to the public an assortment of agency records. See 5 U.S.C. § 552(a). The statute provides for nine exemptions from disclosure, two of which are implicated here. 5 U.S.C. § 552(b). Exemption 7(C) protects from disclosure "records or information compiled for law enforcement purposes, but only to the

extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). Exemption 6 protects from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). An agency challenging a FOIA request bears the burden of showing that a claimed exemption applies. 5 U.S.C. § 552(a)(4)(B). We interpret FOIA exemptions narrowly because "disclosure, not secrecy, is the dominant objective of [FOIA]." Department of the Air Force v. Rose, 425 U.S. 352, 361 (1976).

A.Exemption 7(C)

Perlman argues that the district court erred in finding that Exemption 7(C) applied to the ROI because the report concerned an investigation of the EB- 5 program as a whole and not Virtue personally. According to Perlman, the ROI is not a law enforcement record merely because the Inspector General's office wrote it. We agree with the district court that the ROI was compiled for law enforcement purposes.

Our review of a claim under Exemption 7(C) involves two steps: "a document must first be shown to have been compiled for a law enforcement purpose, and if so, the agency must also demonstrate that release of the material would result in one of the . . . harms specified in the [FOIA]." Ferguson v. Federal Bureau of Investigation, 957 F.2d 1059, 1065 (2d Cir. 1992). DOJ's Inspector General prepared the ROI, making the ROI eligible to be categorized as a law enforcement record because "[a]n Inspector General of a federal government agency engages in law enforcement activities within the meaning of FOIA." Ortiz v. United States Dep't of Health and Human Servs., 70 F.3d 729, 733 (2d Cir. 1995). After reviewing the ROI in camera, we agree with the district court that the ROI "was compiled in

connection with an investigation by [the Office of Inspector General] into possible violations of law and, in particular, whether a certain employee, namely Virtue, committed acts that could subject that employee to criminal or civil penalties." Perlman, 2001 WL 910406, at *4; see also Stern v. Federal Bureau of Investigation, 737 F.2d 84, 89 (D.C. Cir. 1984) (investigation by agency of its own employees is for law enforcement purposes "only if it focuses directly on specifically alleged illegal acts, illegal acts of particular identified officials, acts which could, if proved, result in civil or criminal sanctions") (internal quotation marks and citation omitted). The ROI thus was compiled for a law enforcement purpose, and we consider the potential harm in its release in Section C below.

B.Exemption 6

Perlman argues the district court erred in finding that the ROI was similar to a personnel file because (1) the ROI did not involve a disciplinary proceeding; and (2) the ROI responded to specific allegations, not routine record keeping requirements. We disagree. An agency may withhold "personnel and medical files and similar files" if disclosure "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). The statute thus describes "similar files" broadly, and the term includes any "detailed Government records on an individual which can be identified as applying to that individual." United States Dep't of State v. Washington Post Co., 456 U.S. 595, 602 (1982) (internal quotation marks and citation omitted). Nothing in the language of Exemption 6 limits its scope in the manner that Perlman suggests. The ROI clearly is a "detailed Government record" replete with identifying information regarding Virtue and his alleged misconduct. It thus constitutes a "similar file" under Exemption 6.

C.Balancing privacy rights and the public's interest in disclosure

Perlman argues that the privacy interests at issue-those of witnesses, third parties and Virtue-are substantially outweighed by the public's interest in exposing the flaws in the administration of the EB-5 program. He urges us to find error in the district court's conclusion to the contrary. We agree with the district court that the privacy interests of witnesses and third parties outweigh the public's interest in disclosure. However, after applying several factors we find relevant in assessing whether the information concerning a government employee should be disclosed to the facts of this case, we conclude that the public's interest in disclosure of the ROI, with limited exceptions, substantially outweighs Virtue's privacy interests.

As noted previously, in the case of the 7(C) exemption, we ask if the record was compiled for a law enforcement purpose and if its release would result in harm. The exemption applies "where the invasion of personal privacy resulting from release of the information would outweigh the public interest in disclosure." Halpern, 181 F.3d at 296. While both Exemptions 6 and 7(C) implicate privacy interests, the "standard for evaluating a threatened invasion of privacy interests resulting from the disclosure of records compiled for law enforcement purposes is somewhat broader than the standard applicable to personnel, medical, and similar files." United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 756 (1989). Because both exemptions are implicated here, we apply the stricter 7(C) evaluation of privacy interests. The decision to disclose information "must turn on the nature of the requested document and its relationship to the basic purpose of the Freedom of Information Act to open agency action to the light of public scrutiny." Id. at 772 (internal quotation marks and citation omitted).

We first evaluate the privacy interests of witnesses and third parties to the ROI. These parties possess strong privacy interests, because being identified as part of a law enforcement investigation could subject them to "embarrassment and harassment," especially if "the material in question demonstrates or suggests they had at one time been subject to criminal investigation." Halpern, 181 F.3d at 297. The public's interest in learning the identity of witnesses and other third parties is minimal because that information tells little or nothing about either the administration of the INS program or the Inspector General's conduct of its investigation. See id. The strong public interest in encouraging witnesses to participate in future government investigations offsets the weak public interest in learning witness and third party identities. We find that the district court correctly concluded that the names of witnesses and third parties, along with their identifying characteristics, were properly redacted.

Virtue, however, stands on different ground from witnesses and third parties to the investigation because of his status as former INS general counsel and the role he played in administering the EB-5 program. Virtue's privacy interest is "somewhat diminished" by his status as a government employee, although in accepting public employment one does not "not surrender all rights to personal privacy." Kimberlin v. Department of Justice, 139 F.3d 944, 949 (D.C. Cir. 1998) (internal quotation marks and citations omitted). We recognize that a government employee who is the subject of an investigation possesses a strong privacy interest in avoiding disclosure of the details of the investigation. Id. at 949. The public, however, possesses a strong interest and "right to be informed about what their government is up to." Reporters Comm., 489 U.S. at 773 (internal quotation marks omitted).

In balancing a government employee's privacy interests against the public's interest in disclosure, a court should consider several factors, including: (1) the government employee's rank; (2) the degree of wrongdoing and strength of evidence against the employee; (3) whether there are other ways to obtain the information; (4) whether the information sought sheds light on a government activity; and (5) whether the information sought is related to job function or is of a personal nature. The factors are not all inclusive, and no one factor is dispositive. We now apply these factors in evaluating Virtue's privacy interests and the public's interest in disclosing the ROI.

(1) Rank of government employee: We adopt the United States Court of Appeals for the District of Columbia's rule "that the level of responsibility held by a federal employee," is an "appropriate consideration[]" when analyzing disclosure. Stern, 737 F.2d at 92 (ordering release of censure letter issued against a high-level FBI official, but withholding information regarding the disciplining of two low-level FBI employees). Here, this factor weighs strongly in favor of disclosure. Virtue was the INS general counsel, and the ROI investigates allegations that Virtue granted improper access to former INS officials with financial interests in various visa investment firms and gave preferential treatment to their requests. Virtue's high rank, combined with his direct responsibility for the serious allegations examined in the ROI, tilts strongly in favor of disclosure.

(2) Degree of wrongdoing and strength of evidence against the employee: This factor requires a court to examine the degree of wrongdoing allegedly committed by the employee and the strength of the evidence. Strong evidence of wrongdoing, combined with a serious offense, would weigh in favor of disclosure. Thus, in Stern, the court ordered disclosure where the government employee was "a

high-level employee who was found to have participated deliberately and knowingly in the withholding of damaging information in an important inquiry," 737 F.2d at 93-94, but not for lower- level employees who "were not in any sense directly responsible . . . but rather were culpable only for inadvertence and negligence." Id. at 92. Here, a substantial amount of evidence shows that Virtue allowed former INS officials with financial interests in the EB-5 program to exercise improper influence over the program's administration. Further, the degree of wrongdoing alleged is fairly serious, as Virtue's approval of the limited partnership proposals touted by the visa investment companies may have allowed aliens to improperly come to the United States. Both the amount of evidence and degree of wrongdoing alleged weigh in favor of disclosure.

(3) Availability of other means to obtain the information: This factor examines whether the government is the only means for obtaining the desired information. Here, the release of the ROI by the government appears to be the only means available for obtaining information about the investigation. The government performed the investigation, has exclusive access to immigration and other records, and is in a unique position to interview witnesses. This factor argues for disclosure.

(4) Whether the information sought sheds light on government activity: This factor examines whether the information sought furthers FOIA's main purpose of "open[ing] agency action to the light of public scrutiny," Rose, 425 U.S. at 372. The more the information sought sheds light on what the government is doing, the more this factor favors disclosure. See Reporters Comm., 489 U.S. at 773 ("Official information that sheds light on an agency's performance of its statutory duties falls squarely within [FOIA's] statutory purpose."). The ROI investigated Virtue's role in administering the EB-5 program. While Virtue is

discussed extensively, the discussion focuses on his role as INS general counsel. The ROI investigates the extent to which former INS officials were able to obtain preferential treatment, undue access and exercise improper influence over the administration of the EB-5 program through their contract with Virtue. The ROI therefore sheds light on government activity, and this factor weighs in favor of disclosure.

(5) Whether the information is related to job function, or is of a personal nature: This factor is related to the government activity factor because the purpose of FOIA is to shed light on public rather than private activity. FOIA is not a tool to obtain personal information about government employees. Rather, the disclosed information must relate to the employee's performance of his public duties. Aside from providing some minor personal background information about Virtue, which should remain redacted, the ROI focuses exclusively on Virtue's performance as INS general counsel. Thus, this factor weighs heavily in favor of disclosure.

Each of the factors therefore weighs in favor of disclosure. The public's interest in the disclosure of the ROI substantially outweighs Virtue's interest in keeping the information private.[2] We vacate the judgment of the district court below and order the district court to release the portions of the ROI specified in this opinion. We exempt from disclosure certain information that implicates privacy interests so strong as to outweigh the public's interest in disclosure. Thus, the following sections of the ROI shall remain redacted: the redacted portions of page 3, MOI No. 1 and the names of all witnesses and third parties, including any identifying information. However, DOJ should turn over a less-redacted version of page 2, which still protects the identities of witnesses and third parties mentioned in the synopsis. The restriction on releasing the names and identifying information of witnesses and third parties extends

to all parts of the ROI as redacted by the district court, including any mention in the narrative portions.

CONCLUSION

We affirm the district court's findings regarding Exemptions 6 and 7(C) and the withholding of information regarding witnesses and third parties. However, we vacate the district court's ruling stemming from its balancing of Virtue's privacy interests against the public's interest in disclosure, and remand for further release of the ROI in accordance with this opinion.

1. FOOTNOTES

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[1]

By a November 22, 2000, stipulation and order, appellant voluntarily dismissed these defendants.

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[2]

We are mindful that the release of this final report does not impinge upon the protection afforded to preliminary materials compiled by government attorneys in the course of civil and criminal investigations. Traditional protections against the disclosure of legal and investigative documents, including the work product doctrine, deliberative process doctrine, and attorney-client privilege, are incorporated into FOIA by Exemption 5, 5 U.S.C. § 552(b)(5), which immunizes such material from disclosure. Grand Cent. P'ship, Inc. v. Cuomo, 166 F.3d 473, 481 (2d Cir. 1999). Indeed, FOIA provides somewhat

more expansive protection to attorney-client and work product materials than the rules of discovery, because although the rules protect documents covered by work product during litigation, these documents are discoverable after a matter is dismissed with prejudice. These documents remain unavailable at any time through FOIA. FTC v. Grolier, Inc., 462 U.S. 19, 28, 26 (1983). Exemption 7, 5 U.S.C. § 552(b)7, immunizes from discovery law enforcement materials that would not be available under the discovery rules of the agency from which the materials are sought, including, e.g., witness statements, internal and external memoranda, correspondence, subpoenas, analyses, worksheets, and notes. Title Guarantee Co. v. NLRB, 534 F.2d 484, 491 (2d Cir. 1976). Finally, law enforcement documents that comprise the substance of grand jury proceedings, and grand jury proceedings themselves, are not subject to disclosure under FOIA because they are considered to be "court documents," not "agency documents." In re Grand Jury Investigation of Cuisinarts, Inc., 665 F.2d 24, 31 n.10 (2d Cir. 1981). Finally, as this report never was held under a protective order barring discovery, we need not consider the FOIA disclosure immunity for documents held under a protective order barring the future disclosure of the materials subject to the order. See GTE Sylvania, Inc. v. Consumers Union of U. S., Inc., 445 U.S. 375, 387 (1980); accord Morgan v. U.S. Dep't of Justice, 923 F.2d 195, 197 n.2 (D.C. Cir. 1991).

APPENDIX B -- Opinion of the United States District Court for the Southern District of New York Dated and Decided August 13, 2001

Perlman v. U.S. Dept. of Justice
Not Reported in F.Supp.2d
S.D.N.Y.,2001.
Aug. 13, 2001.
OPINION AND ORDER

KOELTL, District J.
*1 Plaintiff Steven E. Perlman ("Perlman") brings this action contesting the denial of portions of his request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, by the United States Department of Justice ("DOJ"). [FN1] The DOJ now moves for summary judgment pursuant to Fed.R.Civ.P. 56.

FN1. In addition to the DOJ, the plaintiff also brought this action

> against former United States Attorney General Janet Reno, Robert L. Ashbaugh, Howard L. Sribnick, Carol Herbert, and Deborah Marie Briscoe. By a Stipulation and Order dated November 10, 2000, the plaintiff voluntarily dismissed these individual defendants from this action. *See* Stipulation and Order dated November 10, 2000.

I. The facts in this case are largely undisputed. On November 17, 1999, the plaintiff submitted a FOIA request to the DOJ's Office of Inspector General ("OIG") seeking a copy of a report, including a list of exhibits and copies of the exhibits in their entirety (the "Report"), of an investigation conducted by OIG into the handling of the

Alien Entrepreneur program, known as the EB-5 program ("EB-5 program") run by the Immigration and Naturalization Service ("INS"). (Compl. ¶ 1; Declaration of Deborah Marie Briscoe dated December 1, 2000 ("Briscoe Decl."), ¶ 3 & Ex. 1.) Under the EB-5 program, created by Section 121(b)(5) of the Immigration Act of 1990, Pub L. No. 101-649, 1990 U.S.C.A.A.N. (104 Stat.) 4978, 4989-90 (Nov. 29, 1990) (codified at 8 U.S.C. § 1153(b)(5)), alien investors may qualify for preferred visa status by investing a set amount of money in a United States business and creating full-time employment for a set number of individuals. *See* 8 U.S.C. § 1153(b)(5)(a). An alien seeking to obtain lawful permanent residence in the United States under the EB-5 program must first file a petition with the INS. If the petition is approved, the immigrant investor (as well as dependents, if any) is admitted for permanent residence on a conditional basis. *See* 8 U.S.C. § 1186b(a)(1). The investor must subsequently file another petition to have the conditional status removed within ninety days of the second anniversary of his lawful admission for permanent residence. *See* 8 U.S.C. §§ 1186b(c)(1), (d)(2). The EB-5 petition is granted if the INS determines that the alien sustained the required investment and entrepreneurial activities during the period of his or her conditional residency. *See* 8 U.S.C. § 1186b(d)(1); *see also* 8 C.F.R. § 216.6(a)(4).

By letter dated November 18, 1999, a Paralegal Specialist at OIG, Deborah Marie Briscoe ("Briscoe"), acknowledged receipt of the plaintiff's FOIA request. (Compl. ¶ 2 & Ex. 1.) In response to the plaintiff's FOIA request, OIG located a 143-page report of an investigation dated October 25, 1999. (Def.'s 56.1 St. ¶ 2.) OIG contends that the Report examines allegations that Paul Virtue ("Virtue"), then a senior official at the INS and

specifically its general counsel, had improperly granted former INS officials preferential treatment and undue access and influence in the administration of the EB-5 program. (Def.'s 56.1 St. ¶ 3.) [FN2] The plaintiff, however, alleges that the Report investigated the entire EB-5 program and the implementation thereof and not simply Virtue's conduct. (Pl.'s 56.1 St. ¶ 1.) The Report itself consists of the two-page synopsis of OIG's investigation, a form setting forth basic identifying information concerning Virtue, a list of 40 exhibits, and the exhibits. (Def.'s 56.1 St. ¶ 4.)

> FN2. Virtue left the INS in 1999. (Compl.¶ 15.)

*2 By letter dated January 27, 2000, Briscoe informed the plaintiff that OIG was withholding the Report in its entirety pursuant to 5 U.S.C. §§ 552(b)(6) & (b)(7)(C) ("Exemption 6" and "Exemption 7(C)"). (Compl. Ex. 2; Def.'s 56.1 St. ¶ 5.) Exemptions 6 relates to personnel and similar files. Exemption 7(C) relates to records or information compiled for law enforcement purposes. On or about February 7, 2000, the plaintiff filed an appeal to the Co-Director of the DOJ's Office of Information Privacy ("OIP"). (Compl. Ex. 3; Def.'s Rule 56.1 St. ¶ 6.) The plaintiff alleges that the DOJ failed to determine his appeal within the twenty business days provided by FOIA, 5 U.S.C. § 552(a)(6)(A)(ii). (Compl.¶ 7.)
The plaintiff filed this action on August 7, 2000. By letter dated October 30, 2000, OIP Co-Director Richard Huff ("Huff") released to the plaintiff 49 pages of the Report, some of which were partially redacted. (Briscoe Decl. Ex. 3.) Huff, however, determined that OIG properly withheld the remaining portions of the Report pursuant to Exemption 6 and Exemption 7(C). (Briscoe Decl. Ex. 3.) The DOJ disclosed an additional four pages of the Report to the plaintiff on February 6, 2001 pursuant to the privacy waiver of Sheldon Alexander Gisser. (Letter from Sarah S.

Normand dated February 6, 2001.)
At a hearing held on June 22, 2001, the Court informed the DOJ that in order to evaluate properly OIG's reasons for redacting the remaining portions of the Report, it needed to review the redacted portions of the Report in camera. (Transcript dated June 22, 2001 ("Tr."), at 41.) [FN3] The Court requested that the DOJ first review the Report to determine if any of the redacted portions should be disclosed before the Court reviewed the Report in its entirety. (Tr. at 41.) On June 29, 2001 the DOJ submitted an unredacted copy of the Report to this Court. In addition, after reviewing the prior redactions, the DOJ, in consultation with OIG, disclosed to the plaintiff an additional 30 pages of the Report, some of which were partially redacted. (Letter from Sarah S. Normand to the Court dated June 29, 2001; Letter from Sarah S. Normand to Mark S. Zaid dated June 29, 2001.)

> FN3. Although "[i]n camera review is considered the exception, not the rule, ... the propriety of such review is a matter entrusted to the district court's discretion." *Local 3, Int'l Bhd. of Elec. Workers, AFL-CIO v. NLRB*, 845 F.2d 1177, 1180 (2d Cir.1988); *see also Halpern v. FBI*, 181 F.3d 279, 295 (2d Cir.1999). Thus, the Court, in its discretion, has chosen to review the Report in camera.

In response to the DOJ's motion for summary judgment, the plaintiff argued that the declarations and *Vaughn* index, *see Vaughn v. Rosen*, 484 F.2d 820, 823 (D.C.Cir.1973), submitted by the DOJ were insufficient to support summary judgment. The plaintiff also contended that the DOJ's

declarations were submitted in bad faith. Because the Court's has reviewed the Report in camera, the plaintiff's argument concerning the DOJ's declarations and *Vaughn* index are now moot because the Court has independently examined the Report and determined whether the redactions are in fact justified.

II. FOIA "was enacted to facilitate public access to Government documents," *United States v. Ray*, 502 U.S. 164, 173 (1991), and the statute reflects "a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." *Department of Air Force v. Rose*, 425 U.S. 352, 360-361 (1976) (internal citation and quotation marks omitted). Within FOIA, Congress created nine exemptions to the general rule of agency disclosure, *see* 5 U.S.C. § 552(b), all of which are "narrowly construed with doubts resolved in favor of disclosure." *Federal Labor Relations Auth. v. United States Dep't of Veterans Affairs*, 958 F.2d 503, 508 (2d Cir.1992).

An agency's decision to withhold or redact documents requested under FOIA is reviewed de novo. *See* 5 U.S.C. § 552(a)(4)(B); *see also Massey v. FBI*, 3 F.3d 620, 622 (2d Cir.1993). Where an agency withholds or redacts documents requested under FOIA, the agency bears the burden of proving that the withheld or redacted documents fall within a FOIA exemption. *See* 5 U.S.C. § 552(a)(4)(B); *see also Ray*, 502 U.S. at 173; *Massey*, 3 F.3d at 622. [FN4]

FN4. FOIA expressly authorizes redaction of information that would result in "a clearly unwarranted invasion of personal privacy" or that was otherwise exempt. 5 U.S.C. §§ 552(a)(2) & (b); *see also Ray*, 502 U.S. at 174 & n. 9.

*3 The Report consists of a two-page Synopsis of the Abbreviated Report of Investigation ("Synopsis"), a one-page Subject of Investigation, a List of Exhibits, and a series of forty exhibits consisting of Memorandums of Investigation ("MOIs"). The first 22 MOIs summarize interviews of certain witnesses. MOIs 23 through 40 refer to the receipt of certain documents pursuant to document requests and from various witnesses ("Exhibit Documents"). Each Exhibit Document is attached to a corresponding MOI. The DOJ, in consultation with OIG, has redacted various portions of the Report, including portions of the Exhibit Documents, relying on Exemption 6 and 7(C). The DOJ argues that the material withheld falls into three categories: (i) the names of OIG special agents involved in the investigation; (ii) the names of witnesses and others mentioned in the report and information relating to them; and (iii) information relating to Virtue. (Def.'s 56.1 St. ¶ 10.) [FN5] The DOJ argues that OIG has released all portions of the report that can reasonably be segregated from material exempt from disclosure under FOIA.

> FN5. The plaintiff does not seek disclosure of the identities of any OIG Special Agents or the personal information concerning Virtue contained on page 3 of the Report, except with respect to the information withheld in the category "Criminal Record." (Pl.'s Memorandum in Opposition at 14 n. 13.)

Exemptions 6 and 7(C) protect "personal privacy interests threatened by disclosure of agency records." *Hopkins v. United States Dept. of Hous. & Urban Dev.*, 99 F.2d 81, 86 (2d Cir.1991). Exemption 6 permits an agency to withhold "personnel and medical files and similar files the disclosure of which would constitute a clearly

unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). Exemption 7(C), to the extent relied on in this case, protects from disclosure "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information ... could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7). Under both Exemption 6 and 7(C), a court must balance the individual privacy interests at stake against the public interest in disclosure. *United States Department of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 768, 776 (1989). Exemption 7(C), however, is more protective of privacy interests than Exemption 6. *Reporters Comm.*, 489 U.S. at 756 ("[T]he standard for evaluating a threatened invasion of privacy interests resulting from the disclosure of records compiled for law enforcement purposes is somewhat broader than the standard applicable to personnel, medical, and similar files.").

A. To invoke Exemption 7(C), an agency must first establish that the requested records were "compiled for law enforcement purposes." *See FBI v. Abramson*, 456 U.S. 615, 622 (1982); *Ferguson v. FBI*, 957 F.2d 1059, 1065 (2d Cir.1992). The plaintiff argues that the Report was not "compiled for law enforcement purposes," but rather was conducted for purposes of administrative oversight. The plaintiff contends that that the investigation examined the overall implementation of the EB-5 program and not just Virtue's conduct.

***4** In this case, the Report was compiled for law enforcement purposes. The Court of Appeals for the Second Circuit has stated that "once the government has demonstrated that the records were compiled in the course of an investigation conducted by a law enforcement agency, the purpose or legitimacy of such executive action are not proper subjects for judicial review." *Halpern v.*

FBI, 181 F.3d 279, 296 (2d Cir.1999); *see also* *Ferguson*, 957 F.2d at 1070; *Williams v. FBI*, 730 F.2d 882, 883 (2d Cir.1984). "An Inspector General of a federal government agency engages in law enforcement activities within the meaning of FOIA." *Ortiz v. United States Dept. of Health and Human Servs.*, 70 F.3d 729, 732-33 (2d Cir.1995); *see also* *Local 32B-32J Serv. Employees Int'l Union v. GSA*, No. 97 Civ. 8509, 1998 WL 726000, at *7 (S.D.N .Y. Oct. 15, 1998); *Ligorner v. Reno*, 2 F.Supp.2d 400, 404-405 (S.D.N.Y. Mar. 26, 1998); *Williams v. McCausland*, Nos. 90 Civ. 7563, 91 Civ. 7281, 1994 WL 18510, at *11 (S.D.N.Y. Jan. 18, 1994). Here, having review the Report and the Declaration of Gail Robinson dated December 1, 2000, at ¶ 8, it is plain that the Report was compiled in connection with an investigation by OIG into possible violations of law and, in particular, whether a certain employee, namely Virtue, committed acts that could subject that employee to criminal or civil penalties. Thus, the Report was "compiled for law enforcement purposes" within the meaning of Exemption 7(C). *See* *Stern v. FBI*, 737 F.2d 84, 89 (D.C.Cir.1984) ("[A]n agency's investigation of its own employees is for 'law enforcement purposes' ... if it focuses directly on specifically alleged illegal acts, illegal acts of particular identified officials, acts which could, if proved, result in civil or criminal sanctions.").

B. Exemption 6 permits an agency to withhold "personnel and medical files and similar files" where disclosure "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). The primary purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information" and the exemption is not limited to discrete personal information. *United States Dept. of State v. Washington Post Co.*, 456 U.S. 595, 599-602 (1982). The Supreme Court has

interpreted "similar files" broadly to include "detailed Government records on an individual which can be identified as applying to that individual." *Washington Post Co.*, 456 U.S. at 601-602 (internal quotation and citation omitted); *Ray*, 502 U.S. at 175; *Williams*, 1994 WL 18510, at *11.

In this case, the Report contains information with respect to alleged misconduct by Virtue, including information affecting his reputation. The sort of information contained in the Report with respect to Virtue has privacy value similar to information generally found in personnel files. Thus, with respect to Virtue, the Report constitutes a "similar file" under Exemption 6. *See e.g.*, *Ligorner*, 2 F.Supp.2d at 405 (noting that " '[s]imilar files' refers to files that have a privacy value similar to those found in medical or personnel files."); *Pototsky v. Dept. of Navy*, 695 F.Supp. 1084, 1087 (D. Hawaii 1988) (finding that investigative records concerning alleged misconduct of a particular individual are "similar files" under Exemption 6), *aff'd*, 912 F.2d 469 (9th Cir.1990).

***5** In addition, certain documents attached to various MOIs relating to the receipt of certain documents contain information applying to particular alien investors in the EB-5 program, such as names and identification numbers, which have privacy value akin to information found in personnel files. Thus, to the extent that certain attached documents contain such identifying information, Exemption 6 covers those documents, with respect to the alien investors, because these documents are "similar files." *See Ray*, 502 U.S. at 178 (finding redaction of identifying information concerning Haitian nationals returned to Haiti was justified because the invasion of the returnees' privacy interests was "clearly unwarranted").

C. The plaintiff argues that any privacy interests of the witnesses, third parties mentioned in the Report, and Virtue are substantially outweighed by the public interest

in uncovering alleged corruption in a government agency. In particular, the plaintiff asserts that the Report involves high-ranking government officials acting in a public capacity, thus minimizing their need for privacy, while magnifying the public interest in disclosure. The plaintiff also contends that the DOJ has failed to introduce any evidence that there is sufficient harm to the privacy interests of the witnesses, third parties identified in the Report, or Virtue.

In applying both Exemption 6 and 7(C), courts balance the individual privacy interests at stake against the public interest in disclosure. *Reporters Comm.*, 489 U.S. at 775; *Massey*, 3 F.3d at 624. The relevant public interest in disclosure to be weighed in this balance is the extent to which disclosure would serve FOIA's basic purpose, which is to preserve "the citizens' right to be informed about what their government is up to." *Reporters Comm.*, 489 U.S. at 773 (internal quotation marks omitted). This statutory purpose is furthered by disclosure of "[o]fficial information that sheds light on an agency's performance of its statutory duties." *Reporters Comm.*, 489 U.S. at 773; *see also United States Department of Defense v. FLRA*, 510 U.S. 487, 495 (1994); *Ray*, 502 U.S. at 175; *Massey*, 3 F.3d at 624-25. [FN6]

> FN6. The purpose for which a FOIA request is made does not determine whether an invasion of privacy is warranted. *FLRA*, 510 U.S. at 496; *Reporters Comm.*, 489 U.S., at 771.

Here, the DOJ has satisfied its burden by showing that the privacy interests implicated in this case are not outweighed by the public interest in disclosure of those redacted portions of the Report contained in the Synopsis, the Subject of Investigation, the List of Exhibits, and the various MOIs with attachments that pertain to the names of witnesses and third parties and other identifying

information, along with information concerning Virtue. There are important privacy interests that would be lost by the disclosure of the redacted portions of the Report contained in the Synopsis, the Subject of Investigation, the List of Exhibits, and the MOIs with attachments. "[A]lthough government officials ... may have a 'somewhat diminished' privacy interest, they do not surrender all rights to personal privacy when they accept a public appointment." *Kimberlin v. Dept. of Justice*, 139 F.3d 944, (D.C.Cir.1998) (internal quotation omitted). A government employee who has been the subject of investigation has a privacy interest in avoiding disclosure of the details of the investigation of his alleged misconduct. *See id.* at 949. Disclosure of the identities of individuals whose names have turned up in an investigation or who are the subjects of an investigation could subject those individuals to embarrassment, harassment, or the stigma of being associated with a criminal or federal investigation. *See Reporters Comm.*, 489 U.S. at 767; *Halperin*, 181 F.3d at 296-97; *Massey*, 3 F.3d at 624; *Williams*, 1994 WL 18510, at *12. Such privacy interests cannot be waived through prior public disclosure or through the passage of time. *Halperin*, 181 F.3d at 297.

***6** In addition, disclosure of the names of individuals who provided information during an investigation or the disclosure of other information identifying those persons may subject such individuals to embarrassment, harassment or threats of reprisal. *See Diamond v. FBI*, 707 F.2d 75, 77 (2d Cir.1983); *Williams*, 1994 WL 18510, at *12. Moreover, third parties identified in agency records have an important privacy interest in remaining anonymous because the "mention of an individuals name in a law enforcement file will engender comment and speculation and carry a stigmatizing connotation." *Lawyers Comm. for Human Rights v. INS*, 721 F.Supp.

552, 565 (S.D.N.Y.1989) (quotation omitted); *see also Reporters Comm.*, 489 U.S. at 767; *Massey*, 3 F.3d at 624. Having reviewed the entire Report in camera, and having considered all of the plaintiff's arguments, the Court finds that the substantial privacy interests in this case outweigh the public interest in the disclosure of the information redacted in the Synopsis, the Subject of Investigation, the List of Exhibits, and the MOIs. In general, the identities of witnesses or third parties in a particular investigation shed no light on the Government's performance of its public duties. *See Halperin*, 181 F.3d at 297; *Massey*, 3 F.3d at 625. The overwhelming amount of the Report concerns the details of the investigation of the subject of the investigation--Paul Virtue. Virtue has a significant privacy interest in avoiding the disclosure of the details of the investigation. *See Kimberlin*, 139 F.3d at 949. That interest is not outweighed by any light those details may shed on the operation of the EB-5 program, particularly in view of the substantial disclosures made in the unredacted portions of the Report, and the additional disclosures that the Court orders below with respect to the operation of the EB-5 program.

Although portions of the information redacted in the Synopsis and the various MOIs summarizing witness interviews concern the performance of INS's public duties in administering the EB-5 program, the privacy interests of the witnesses, third parties mentioned in the Report and Virtue outweigh the public interest in that information. Thus, with respect to these redactions, disclosure of this information could "reasonably be expected to constitute an unwarranted invasion of privacy" under Exemption 7(C) and would "clearly constitute an unwarranted invasion of privacy" under Exemption 6.

The DOJ, however, has not sustained its burden with respect to the redaction of portions of the Exhibit Documents attached to MOIs 23 through 40, except to the

extent that certain Exhibit Documents contain the names of alien investors in the EB-5 program and other identifying information. While the MOIs themselves were created in the course of the investigation and reveal the names of people who cooperated in the investigation, and are properly subject to redaction, the Exhibit Documents were not created in the course of the investigation that produced the Report, but rather are pre-existing documents that were produced to the OIG from various witnesses and in response to requests for documents. Although these Exhibit Documents, as part of the Report, were "compiled for law enforcement purposes," and are thus subject to Exemption 7(C) balancing, *see John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 154-55 (1989), the privacy interests of the persons named in the Exhibit Documents is diminished, as compared to the other sections of the Report, because the Exhibit Documents themselves were not created as a result of any investigation and the association between those named in the Exhibit Documents and any potentially unlawful activity or law enforcement purpose is attenuated. In addition, with the exception of the information contained in certain of the Exhibit Documents identifying specific alien investors by name or through an identification number, the information contained in the Exhibit Documents does not have privacy value similar to information generally found in personnel files or medical files.

*7 The public interest in the disclosure of the information contained in the Exhibit Documents is high because it sheds light on the INS's performance of its statutory duties in implementing the EB-5 program. Accordingly, the public interest in the disclosure of the Exhibit Documents, with the exception of the names of alien investors participating in the EB-5 program and other information identifying those investors, outweigh the privacy interests

implicated in those documents. The DOJ has already produced a considerable amount of the previously redacted Exhibit Documents. Because the production of the remaining redacted portions of the Exhibit Documents, subject to the exceptions noted below, could not "reasonably be expected to constitute an unwarranted invasion of privacy" under Exemption 7(C) or "clearly constitute an unwarranted invasion of privacy" under Exemption 6, the remaining redacted portions of the Exhibit Documents, excepted as noted below, as set forth in the accompanying Appendix, must be produced to the plaintiff. [FN7]

> FN7. For the reasons explained above, however, the redactions in the MOIs of the names of witnesses interviewed in connection with the investigation that produced certain of the Exhibit Documents is proper. The redactions in the MOIs themselves are justified.

The public interest in the disclosure of the identities of those alien investors participating in the EB-5 program, however, is minimal because this information is not relevant to the INS's performance of its statutory duties and the disclosure of that information would "clearly constitute an unwarranted invasion of privacy" under Exemption 6. Thus, the DOJ correctly redacted the identities of alien investors participating in the EB-5 program. *See Ray*, 502 U.S. at 174-76. As a consequence, the attachment to MOI 26 was properly redacted because it consists almost entirely of personal identifying information about specific alien investors without disclosing the operation of the EB-5 program.
In addition, the redacted portions of the electronic mail message dated March 5, 1998, attached to MOI 36, and the electronic mail message dated July 2, 1998, attached to

MOI 38, are protected by Exemption 6 because they are documents concerning a particular individual which can be identified as applying to that individual and are thus similar to information contained in a personnel file. Because the significant privacy interests in the information redacted from these documents outweigh any public interest in disclosure, the redaction of these two electronic mail messages was proper. Disclosure of this information would therefore "clearly constitute an unwarranted invasion of privacy" under Exemption 6.

CONCLUSION

For the foregoing reasons, the DOJ's motion for summary judgment is granted in part and denied in part. The DOJ's motion is granted with respect to the redactions contained in the Synopsis, the Subject of Investigation, the List of Exhibits, and the various MOIs. The DOJ's motion is also granted with respect to the redaction of the identities of alien investors participating in the EB-5 program in the Exhibit Documents and the electronic mail messages attached to MOI 36 and 38. The DOJ's motion is denied with respect to the redaction of various Exhibit Documents, as set forth in the attached Appendix, and the DOJ is ordered to produce those Exhibit Documents to the plaintiff. The Clerk of the Court is directed to enter Judgment in accordance with this Opinion and to close this case. [FN8]

> FN8. The plaintiff, while not formally moving for summary judgment, has sought the disclosure of the entire Report. Neither party has suggested that any further evidence should be submitted or that final judgment should not be entered on the basis of all the current submissions to the Court.

*8 SO ORDERED.

APPENDIX [FN9]

FN9. To the extent not specifically listed, the redactions in the Exhibit Documents are justified or the Exhibit Documents have already been disclosed.

The specific Exhibit Documents which have been redacted but should be produced are as follows:

1. The redactions contained in the electronic mail message dated July 24, 1996 from Katherine Lorr, Senior Adjudications Officer, courtesy copied to Paul Virtue, Deputy General Counsel, regarding the nature of an American Immigration Services' scheme attached to MOI 23.

2. The redactions contained in the telefax dated August 8, 1996, attached to MOI 24, with the exception of the names of individual alien investors.

3. The redactions contained in the correspondence, dated August 8, 1996, attached to MOI 25.

4. The redactions contained in the telefax memorandum, dated August 23, 1996, attached to MOI 27, with the exception of the names of individual alien investors and their INS case numbers, and other identifying information.

5. The entire electronic mail message, dated November 2, 1998, from Janice Podolny, Associate Counsel, INS, courtesy copied to Paul Virtue, Deputy General Counsel, INS, attached to MOI 31.

6. The redactions contained in the telefax correspondence, dated November 7, 1997, from William P. Cook, former INS General Counsel, to Mike Lebow, Associate Counsel, INS, attached to MOI 34, with the exception of the names of individual alien investors.

S.D.N.Y.,2001.

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2001 WL 910406 (S.D.N.Y.)

APPENDIX C – THE FREEDOM OF INFORMATION ACT, 5 U.S.C. § 552, As Amended

(b) This section does not apply to matters that are--

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information ... (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy

Supreme Court, U.S.
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No. 02-1270

In the Supreme Court of the United States

STEVEN E. PERLMAN, PETITIONER

v.

UNITED STATES DEPARTMENT OF JUSTICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a report of an investigation conducted by the Justice Department's Office of the Inspector General concerning alleged improprieties in the administration of an immigrant investor program was "compiled for law enforcement purposes," within the meaning of Exemption 7 of the Freedom of Information Act, 5 U.S.C. 552(b)(7).

2. Whether public disclosure of the names and other identifying characteristics of third parties and witnesses in the Inspector General's report "could reasonably be expected to constitute an unwarranted invasion of personal privacy," within the meaning of Exemption 7(C) of the Freedom of Information Act, 5 U.S.C. 552(b)(7)(C).

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In the Supreme Court of the United States

No. 02-1270

STEVEN E. PERLMAN, PETITIONER

v.

UNITED STATES DEPARTMENT OF JUSTICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 312 F.3d 100. The opinion of the district court (Pet. App. 15a-30a) is unreported.

JURISDICTION

The court of appeals entered its judgment on November 25, 2002. The petition for a writ of certiorari was filed on February 24, 2003 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Through the Freedom of Information Act (FOIA), 5 U.S.C. 552, Congress attempted "to balance the public's need for access to official information with the Government's need for confidentiality." *Weinberger* v. *Catholic Action*, 454 U.S. 139, 144 (1981). To that end, FOIA exempts from the government's general duty of disclosure "records or information compiled for law enforcement purposes" if their production "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(7)(C).

2. Petitioner submitted a FOIA request for a Report of Investigation (Report) prepared by the Office of the Inspector General of the Department of Justice (Inspector General). The Inspector General prepared the Report in response to allegations of impropriety on the part of certain officials of the former Immigration and Naturalization Service (INS), including former INS General Counsel Paul Virtue.[1] Those allegations concerned the EB-5 Investor Visa Program (Investor Program), which permits foreigners to obtain special visas for residence in the United States in exchange for a substantial monetary investment in businesses employing at least ten American workers. When certain conditions are met, the foreign investors can receive permanent resident alien status. See 8 U.S.C. 1186b. The Inspector General sought to determine whether

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[1] On March 1, 2003, certain functions formerly performed within the Department of Justice by the Immigration and Naturalization Service (INS), including the adjudication of immigrant visa petitions, were transferred to the Department of Homeland Security and assigned to its Bureau of Citizenship and Immigration Services. See Homeland Security Act of 2002, Pub. L. No. 107-296, § 451(b), 116 Stat. 2196 (codified at 6 U.S.C. 271(b)).

certain INS officials, and particularly Virtue, had improperly given preferential treatment to former INS officials affiliated with visa investment companies that participated in the Investor Program. Pet. App. 3a.

3. Based on FOIA Exemptions 6 and 7(C), 5 U.S.C. 552(b)(6) and (7)(C), the agency denied petitioner's request for the Report.[2] Petitioner filed an administrative appeal and, before that appeal was resolved, filed suit under FOIA in federal district court seeking release of the Report. Pet. App. 4a.

After reviewing the Report in camera, the district court granted the government's summary judgment motion in part and denied it in part. Pet. App. 15a-30a. By the time that the district court ruled, the government had provided significant portions of the Report to petitioner, while redacting other portions pursuant to Exemptions 6 and 7(C). *Id.* at 17a-18a. The district court held that the Report satisfied Exemption 7's threshold requirement that it be a document "compiled for law enforcement purposes" because the Report was prepared in connection with an Inspector General investigation into whether Virtue had "committed acts that could subject [him] to criminal or civil penalties." *Id.* at 22a; see *id.* at 21a-22a. The district court further held that much of the redacted information contained in the Report was properly withheld under Exemptions 6 and 7(C). *Id.* at 24a-26a. As relevant here, the court explained that "[d]isclosure of the identities of individuals whose names have turned up in an investigation or who are the subjects of an investigation could

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[2] FOIA Exemption 6 authorizes the withholding of "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(6).

subject those individuals to embarrassment, harassment, or the stigma of being associated with a criminal or federal investigation." *Id.* at 25a.

4. The court of appeals affirmed in part and vacated and remanded in part. Pet. App. 1a-14a. The court of appeals "agree[d] with the district court that the [Report] was compiled for law enforcement purposes" and therefore satisfied Exemption 7's threshold requirement. *Id.* at 6a. Based on its own in camera inspection of the Report, the court of appeals concluded that the Report "was compiled in connection with an investigation by [the Office of Inspector General] into possible violations of law and, in particular, whether a certain employee, namely Virtue, committed acts that could subject that employee to criminal or civil penalties." *Id.* at 6a-7a.

In balancing the relevant private and public interests under Exemption 7(C), the court of appeals also agreed with the district court that witnesses and third parties possess strong privacy interests in not having their identities disclosed because "being identified as part of a law enforcement investigation could subject them to 'embarrassment and harassment.'" Pet. App. 9a (quoting *Halpern* v. *FBI*, 181 F.3d 279, 297 (2d Cir. 1999)). The court further explained that "[t]he public's interest in learning the identity of witnesses and other third parties is minimal because that information tells little or nothing about either the administration of the INS program or the Inspector General's conduct of its investigation." Pet. App. 9a. The court noted, as well, that "[t]he strong public interest in encouraging witnesses to participate in future government investigations offsets the weak public interest in learning witness and third party identities." *Ibid.* The court thus concluded that "the names of witnesses and third

parties, along with their identifying characteristics, were properly redacted" in this case. *Ibid.*

With respect to information in the Report concerning Virtue, however, the court of appeals found that the public interest in disclosure outweighed Virtue's privacy interests. Pet. App. 9a-13a. The court explained that Virtue "stands on different ground from witnesses and third parties to the investigation because of his status as the former INS General Counsel and the role he played in administering the [Investor] program." *Id.* at 9a. The court identified several factors as relevant "[i]n balancing a government employee's privacy interests against the public's interest in disclosure," *id.* at 10a, including (1) the government employee's rank, *ibid.*, (2) the "[d]egree of wrongdoing and strength of evidence against the employee," *ibid.*, (3) the "[a]vailability of other means to obtain the information," *id.* at 11a, (4) the degree to which the requested information "sheds light on government activity," *ibid.*, and (5) the extent to which the information is job-related, *id.* at 12a. The court found that each of those factors supported the disclosure of information pertaining to Virtue. *Ibid.*[3]

ARGUMENT

The court of appeals correctly applied established precedent to conclude that the Inspector General's Report qualifies as a law enforcement record and that the privacy interests of witnesses and third parties in avoiding release of their names and identifying information outweigh any public interest in disclosure. Those rulings do not conflict with any decision of this Court or

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[3] In April 2003, the government produced to petitioner the portions of the Report ordered released by the Second Circuit.

of any other court of appeals. Therefore, further review is not warranted.

1. Petitioner contends (Pet. 7-12) that the court of appeals erred in holding that the Inspector General Report was "compiled for law enforcement purposes" within the meaning of Exemption 7. In particular, petitioner argues (Pet. 9-10) that the court relied on a per se rule that all documents prepared by a federal Inspector General satisfy Exemption 7's threshold requirement. The court of appeals, however, applied no such per se rule. The court instead examined the Report in camera and concluded, based on the content and purposes of this particular Report and the circumstances under which it was prepared, that the Report was "compiled for law enforcement purposes," 5 U.S.C. 552(b)(7), because it "was compiled in connection with an investigation by [the Office of Inspector General] into possible violations of law and, in particular, whether a certain employee, namely Virtue, committed acts that could subject that employee to criminal or civil penalties." Pet. App. 6a-7a.

The court then supported its conclusion by reference to the factors applied by the D.C. Circuit in *Stern* v. *FBI*, 737 F.2d 84 (D.C. Cir. 1984), to determine on a case-by-case basis whether a particular investigation is for law enforcement purposes. Pet. App. 7a. The court quoted the appropriate factors as whether the investigation "focuses directly on specifically alleged illegal acts, illegal acts of particular identified officials, acts which could, if proved, result in civil or criminal sanctions." *Ibid.* (quoting *Stern*, 737 F.2d at 89). The court of appeals thus applied the very test that petitioner advocates (Pet. 8-9).

Petitioner also argues (Pet. 10-11) that the investigation described in the requested Report actually

focused on allegations of employee misconduct not rising to the level of civil or criminal wrongdoing. Both courts below, however, examined the Report in camera and reached a contrary conclusion. See Pet. App. 7a, 22a. Petitioner's challenge to the district court's and court of appeals' concurrent findings in that regard raises no question of law warranting this Court's review.

2. Petitioner also seeks (Pet. 12-21) this Court's review of the court of appeals' balancing of the public and private interests implicated by his request for the names and identifying information of witnesses and other third parties in the Report. That claim does not merit review.

Petitioner does not contend that the court of appeals' ruling or legal analysis conflicts with the decisions of any other circuit or with any decision of this Court. To the contrary, the court of appeals applied the exact balancing of public and private interests that this Court prescribed in *United States Department of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989). In so doing, the court reached the same result that this Court has reached in every case where it has been confronted with a FOIA request seeking private information about third parties that is contained in government files: "[I]n none of our cases construing the FOIA have we found it appropriate to order a Government agency to honor a FOIA request for information about a particular private citizen." *Id.* at 774-775; see also *Bibles* v. *Oregon Natural Desert Ass'n*, 519 U.S. 355 (1997) (per curiam); *United States Dep't of Defense* v. *FLRA*, 510 U.S. 487 (1994).

Petitioner's contention that a different rule applies to government officials (Pet. 16-17) ignores *Department of the Air Force* v. *Rose*, 425 U.S. 352 (1976). In that case,

the FOIA request sought access to case summaries of honors and ethics hearings held by the United States Air Force Academy. This Court recognized the appropriateness under FOIA Exemption 6 of redacting identifying information about third parties and witnesses from those case summaries, even though those third parties were members of a military academy and not private civilians. *Id.* at 380-381.[4]

Petitioner asserts (Pet. 15) that disclosing the identities of third parties and witnesses who are government employees would "open agency action to the light of public scrutiny." Exemption 7(C), however, requires a greater showing than that the disclosure of private information would reveal agency action in some measure. The legally relevant question, which the court of appeals asked and answered (Pet. App. 9a), is whether the disclosure would "contribute *significantly* to public understanding of the operations or activities of the government." *Reporters Committee*, 489 U.S. at 775 (emphasis added). That is "the only relevant public interest." *FLRA*, 510 U.S. at 497; see also *Bibles* 519 U.S. at 355-356. The court of appeals correctly concluded that "[t]he public's interest in learning the identity of witnesses and other third parties is minimal because that information tells little or nothing about either the administration of the INS program or the

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[4] The claim to privacy is stronger in this case, which now involves only Exemption 7(C), than the Exemption 6 privacy claim at issue in *Rose*. Exemption 6 permits withholding only if disclosure "*would constitute a clearly unwarranted* invasion of personal privacy." 5 U.S.C. 552(b)(6) (emphasis added). The law-enforcement privacy exemption offers broader protection, exempting from disclosure those records that "*could reasonably be expected* to constitute an unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(7)(C) (emphasis added).

Inspector General's conduct of its investigation." Pet. App. 9a.

Beyond that, petitioner's disagreement with the court of appeals' application of this Court's precedent to the "specific factual and legal circumstances presented in this case" (Pet. 21) is not the type of broad or enduring legal question that merits an exercise of this Court's certiorari jurisdiction. See *Board of Educ.* v. *McCluskey*, 458 U.S. 966, 971 (1982) (Stevens, J., dissenting) ("[T]his Court is not a forum for the correction of errors."); *Boag* v. *MacDougall*, 454 U.S. 364, 367-368 (1982) (Rehnquist, J., dissenting).[5]

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[5] On May 5, 2003, the Court granted the government's petition for a writ of certiorari in *Office of Independent Counsel* v. *Favish*, No. 02-954, which presents a question concerning the proper application of Exemption 7(C). Because the present petition simply seeks review of the court of appeals' application of established law to the "specific factual and legal circumstances presented in this case," Pet. 21, and does not raise any of the broader legal questions presented in the *Favish* petition, the Court's decision in the *Favish* case is unlikely to shed helpful light on the resolution of petitioner's claim. More specifically, because the court of appeals found that there was already a "substantial amount of evidence" suggesting impropriety in the operation of the INS program (Pet. App. 11a), this case does not present the question at issue in *Favish* of whether unsubstantiated allegations of governmental misconduct are sufficient to outweigh privacy interests under Exemption 7(C). The Court, accordingly, need not hold this petition pending the decision in *Favish*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

ROBERT D. MCCALLUM, JR.
Assistant Attorney General

LEONARD SCHAITMAN
SANDRA WIEN SIMON
Attorneys

MAY 2003

Supreme Court, U.S.
FILED
APR 30 2004
OFFICE OF THE CLERK

(3)

No. 02-1270

In The Supreme Court of the United States

Steven E. Perlman, *Petitioner*

v.

United States Department of Justice, *Respondent*

After Decision on Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR REHEARING

Steven E. Perlman
551 Fifth Avenue
Suite 615
New York,NY 10176
(212) 376-8000

Pro Se

PETITION FOR REHEARING

On February 24, 2003, I submitted a petition for a writ of certiorari ("Petition") to the United States Court of Appeals for the Second Circuit ("Second Circuit") in Perlman v. U.S. Department of Justice, 312 F.3d 100 (2d Cir. 2002) ("Perlman"). On April 5, 2004, the Court granted the Petition and ordered that the decision of the Second Circuit in Perlman be vacated and remanded for further consideration in light of National Archives and Records Administration v. Favish et. al., 541 U.S. ___, 124 S.Ct. 1570 (Mar. 30, 2004)(Slip Op. R-35, Docket 02-954) ("Favish"). Pursuant to Rule 44, I respectfully petition the Court for rehearing with respect to its order to remand this case to the Second Circuit. All terms defined in the Petition are hereby incorporated by reference.

I am petitioning for rehearing because Favish does not address the questions posed in the Petition, nor does it provide a basis for altering the decision in Perlman.

One of the two questions posed in the Petition challenges the Second Circuit's finding that the Report of Investigation (ROI) requested through FOIA in this case was compiled for purposes of law enforcement. Favish does not touch upon this issue and does not shed any light on it for the Second Circuit's consideration.

The other question posed in the Petition concerns the proper test to be applied in balancing the public interest in disclosure against the privacy interests of witnesses and third parties under FOIA Exemption 7(C). This question is related to the issue considered by the Court in Favish, but picks up where Favish left off.

The Court held in Favish that when a FOIA requester asserts a public interest in exposing alleged impropriety by the Government "the requester must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred" (Favish, 124 S.Ct. at

1581, Slip Op. at 16). The Court adopted this as a "less stringent standard" (*id.* at 1582, Slip Op. at 16) than the prior requirement of "clear evidence" needed to displace the normal "presumption of legitimacy accorded to the Government's official conduct." (*id.* at 1581, Slip Op. at 16) The Court held that "[o]nly when the FOIA requester has produced evidence sufficient to satisfy this standard will there exist a counterweight on the FOIA scale for the court to balance against the cognizable privacy interests in the requested records" (*id.* at 1582, Slip Op. at 16).

In Perlman, a case decided prior to the adoption by this Court of the less stringent Favish standard, the Second Circuit identified evidence of wrongdoing as one of several key factors to be analyzed in determining whether a document should be released. It found "a substantial amount of evidence" of the alleged wrongdoing that weighed in favor of release (Perlman, 100 F.3d at 107-08). There was no less evidence of wrongdoing found in Perlman than would be required by the standard of Favish, i.e., enough to believe that the impropriety "might have occurred." If anything, the Second Circuit's finding of "a substantial amount of evidence" is akin to the more stringent, pre-Favish standard of "clear evidence." Moreover, newly obtained evidence, discussed below, constitutes an actual investigative finding of wrongdoing, and not mere evidence of alleged wrongdoing.

The issue raised in the second question of the Petition, concerning the proper balancing test to be used in weighing the privacy interests of witnesses and third parties against the public interest in exposing alleged wrongdoing by the Government, was not addressed in Favish. The Court noted that "the balancing exercise in some other case might require us to make a somewhat more precise determination . . . We need not do so here, however." (Favish, 124 S.Ct. at 1582, Slip Op. at 16-17).

The present case is precisely such a case in need of a more precise determination. The Second Circuit balanced the privacy interests of witnesses and third parties against the public interest, but merely stated it as a conclusion that their identities provided little information of public interest as weighed against their privacy interests and the public interest in having them testify (see Perlman, 100 F.3d at 106). The Second Circuit then applied a detailed balancing test with respect to the target of the investigation. Contrasting the two balancing exercises conducted by the Second Circuit evidences that its test for witnesses and third parties was lacking.

The Court's decision in Favish does not shed any additional light on this subject. On the contrary, the Court stopped at the water's edge in Favish and explicitly declared that there was no need to go any further in that case. Therefore, reconsideration of this case in light of Favish could not lead the Second Circuit to any greater clarity in its formulation.

The need to go beyond the water's edge is acute in the present case. The Court expressed concern in Favish for innocent witnesses who become involved in law enforcement investigations "by happenstance" (Favish, 124 S.Ct. at 1577, Slip Op. at 10). However, in the present case, the witnesses and third parties in the EB-5 investigation did not become involved "by happenstance." These "witnesses" were mid and senior level officials of the Government who were deeply involved in the EB-5 program as Virtue's superiors, peers and subordinates. These "third parties" were described in the ROI as "suspect" investment partnerships whose "severely flawed and unqualified" petitions were approved by INS through undue influence (JA 112-13).

Although never charged in any law enforcement proceeding, these "witnesses" and "third parties" were not devoid of responsibility for the events in question,

and none was a mere bystander. On the contrary, the record demonstrates that all were active participants, whether intentionally or not, in a pervasive scheme of wrongdoing within the Government that remains somewhat shielded from scrutiny to the present day.

Moreover, recently obtained evidence indicates that the alleged wrongdoing by the target of the investigation not only "might have occurred," but in fact, was explicitly found to have occurred by the Office of the Inspector General ("OIG") of the U.S. Department of Justice ("DOJ"). As indicated in the attached Exhibit II, this evidence was only released by the OIG FOIA Unit in response to the Second Circuit's decision in Perlman, long after the Petition was filed with this Court.

The attached portion of the OIG Complaint Form (Exhibit III) served as an internal summary of the OIG investigation of this matter. Upon conclusion of the investigation, this form was finalized to indicate whether the allegations against the target of the investigation had been "substantiated." The answer to this question was originally redacted on grounds of FOIA Exemptions (6) and (7)(C) (see Exhibit I). However, in light of the decision in Perlman, the redaction was removed to reveal the letter "Y," shorthand for "Yes." This was the most fundamental investigative finding that could be reached.

Throughout the proceedings in the courts below, DOJ's central and oft-repeated contention was that the ROI should not be released because it did not "contain" a finding of deliberate wrongdoing by Virtue (see *eg.*, Robinson Declaration, JA 108). It is now clear that this contention by DOJ was literally true, but highly misleading. We now know that the ROI did not contain an explicit finding of wrongdoing because OIG did not put the finding there, where it belonged.

The action of OIG in excluding its key investigative finding from its own official Report of

Investigation is not consistent with a presumption of legitimacy in official conduct. DOJ's attempt to bootstrap on this pretermission as a basis for refusing to release the ROI to the public is similarly inconsistent with the presumption of legitimacy.

In sum, the record evidences that there was a pervasive scheme of manipulating the administrative adjudication arms of the (former) INS in order to produce windfall profits from the sale of bogus investments to alien investors, wrongly entitling these aliens to U.S. permanent residence. The scheme achieved outstanding success in thousands of cases over several years. The ROI evidences that at least one senior INS official played a significant role in allowing this scheme to prosper. The attached evidence demonstrates that the OIG found the allegations of impropriety against this official to be "substantiated," but did not state this in the ROI. OIG and DOJ then opposed release of the ROI on grounds that it did not "contain" any such finding.

CONCLUSION

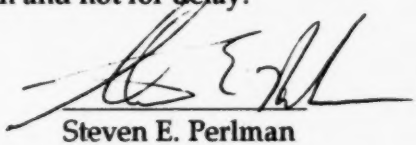
The standard required by Favish has already been met, due to wrongdoing by the (former) INS, OIG and DOJ. Beyond this point, Favish does not provide the additional guidance that would be needed by the Second Circuit to reconsider this case. Therefore, the Court should not remand this case to the Second Circuit.

Respectfully submitted,
Steven E. Perlman
551 Fifth Avenue, Suite 615
New York, NY 10176
Tel: (212) 376-8000
Pro Se

April 30, 2004

Certification of Pro Se Petitioner

I hereby certify that this Petition for Rehearing is presented in good faith and not for delay.



April 30, 2004 Steven E. Perlman

EXHIBITS TO

PETITION FOR REHEARING

EXHIBIT I

Details:
Complainant provided information relating to initial INS approvals of (EB-5) Investor Visa petitions submitted by [redacted] American Immigration Services (AIS). AIS claims a 100% success rate for obtaining EB-5 visas and claims that its investment program have INS approval. [redacted]

Complainant further alleges that the AIS investment program itself is suspect. Normally, a $500,000 investment is required to qualify for the EB-5 Visa. However, with the AIS investment program allegedly the investor puts down only $125,000 and a promissory note for $375,000. This note is "secured" by investor assets as per INS requirements. The payment structure on the note is such that the investor pays nothing but the interest for four years. Most of the money remains in the limited partnership (controlled by the General Partnership) without going to the factory or whatever company is the beneficiary of the funds. Then, at the end of five years (after the conditions have been removed), the investor has the option to get out of the investment before the final major balloon payment of about $300,000 is due. At that point in time the option is up to the investor. In the meantime, the investor has secured Legal Permanent Residence (LPR) status with the $125,000 down payment.

DISPOSITION DATA: Office: WA Date: 02/20/1998 Disposition: I Approval: CTH
Referred To Agency: Component: INS
Fee Case: X Civil Rights: N Priority: Y
Other Number: Consolidated Case Number:
Remarks:
REQUESTING ADDITIONAL BACKGROUND INFORMATION AND DOCUMENTS RELATING TO "E" VISAS AND AIS.

CASE INFORMATION: INVESTIGATION TYPE: Investigation
Assigned to: WA Investigat[redacted] Total Hours Used: 1127.0
Received Date: 02/18/1998 Date Created: 02/20/1998 Date Last Modified: 11/01/1999
Status Code: CLCR Close Date: 10/25/1999 Substantiated[redacted]
Shared Investigation?: Other Agency:
Admin Activity?: Y Judicial Activity?: Y

CASE STATUS:
Case assigned to SA[redacted]

S[redacted]has reviewed printed materials made available by complainants and has received additional materials to be reviewed.

08/04/98: [redacted] regarding [redacted]

8/10/98: SA[redacted]conducted interviews of two primary

BEST AVAILABLE COPY

EXHIBIT II

August 26, 2003

Steven E. Perlman, Esq.
Suite 615
551 Fifth Avenue
New York, New York 10176

Subject: Freedom of Information/Privacy Act Request [02-OIG-46]

Dear Mr. Perlman:

This letter is in reference to your February 15, 2002, Freedom of Information Act (FOIA) request submitted jointly with Douglas Pasternak to the Office of the Inspector General (OIG), seeking documents related to the OIG's investigation regarding "the EB-5 visa program." As you are aware, in July 2002, the OIG processed your request, releasing certain material to you and withholding other material. You appealed the OIG's action to the Office of Information and Privacy (OIP). In June 2003, OIP remanded your request to OIG for reprocessing in light of the Second Circuit's decision in Perlman v. United States Dep't of Justice, 312 F.3d 100 (2002).

The OIG has completed the reprocessing of your request. Enclosed is the additional material the OIG has determined is responsive to your request and for which no FOIA exemption is being asserted. Certain information has been redacted from this material pursuant to FOIA exemptions 5, 6, and 7(C), 5 U.S.C. §552(b)(5),(b)6, and (b)(7)(C), as amended. The applicable exemptions for the redactions are indicated on the documents themselves. In addition, 65 pages of material continue to be withheld in full pursuant to the same exemptions. Please note that in making this release, the OIG has taken into consideration the privacy waivers your attorney submitted in connection with the FOIA request that was the subject of the Second Circuit decision.

If you are dissatisfied with my action on this request, you may appeal from this partial denial by writing to the Co-Director, Office of Information and Privacy, U.S. Department of Justice, Flag Building, Suite 570, Washington, D.C. 20530, within 30 days of your receipt of this letter. Both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal." In the event you are dissatisfied with the results of any such appeal, judicial review will thereafter be available to you in

the United States District Court for the judicial district in which you reside or have your principal place of business, or in the District of Columbia, which is also where the records you seek are located.

Sincerely,

Deborah Marie Waller
Paralegal Specialist
Office of the General Counsel

EXHIBIT III

Details:
Complainant provided information relating to initial INS approvals of (EB-5) Investor Visa petitions submitted by [redacted] American Immigration Services (AIS). AIS claims a 100% success rate for obtaining EB-5 visas and claims that its investment program have INS approval. Complainant advised that the access to high level INS personnel given to [redacted] as well as the perception that he could choose which INS office to bring his investment program, gives at least the appearance of impropriety on the part of INS employees.

Complainant further alleges that the AIS investment program itself is suspect. Normally, a $500,000 investment is required to qualify for the EB-5 Visa. However, with the AIS investment program allegedly the investor puts down only $125,000 and a promissory note for $375,000. This note is "secured" by investor assets as per INS requirements. The payment structure on the note is such that the investor pays nothing but the interest for four years. Most of the money remains in the limited partnership (controlled by the General Partnership) without going to the factory or whatever company is the beneficiary of the funds. Then, at the end of five years (after the conditions have been removed), the investor has the option to get out of the investment before the final major balloon payment of about $300,000 is due. At that point in time the option is up to the investor. In the meantime, the investor has secured Legal Permanent Residence (LPR) status with the $125,000 down payment.

DISPOSITION DATA: Office: WA Date: 02/20/1998 Disposition: I Approval: CTH
Referred To Agency: Component: INS
Fee Case: X Civil Rights: N Priority: Y
Other Number: Consolidated Case Number:
Remarks:
REQUESTING ADDITIONAL BACKGROUND INFORMATION AND DOCUMENTS RELATING TO "E" VISAS AND AIS.

CASE INFORMATION: INVESTIGATION TYPE: Investigation
Assigned to: WA Investigat[redacted] Total Hours Used: 1127.0
Received Date: 02/18/1998 Date Created: 02/20/1998 Date Last Modified: 11/01/1999
Status Code: CLCR Close Date: 10/25/1999 Substantiated?: Y
Shared Investigation?: Other Agency:
Admin Activity?: Y Judicial Activity?: Y

CASE STATUS:
Case assigned to SA [redacted]

S[redacted] has reviewed printed materials made available by complainants and has received additional materials to be reviewed.

08/04/98: [redacted] regarding [redacted] ot [redacted]

8/10/98: SA [redacted] conducted interviews of two primary